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Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

6 JOE FERNANDEZ,

7 Defendant.
8 -----x

9 New York, N.Y.
10 March 5, 2013
11 10:00 a.m.

12 Before:

13 HON. ALVIN K. HELLERSTEIN,

14 District Judge

15 APPEARANCES

16 PREET BHARARA

17 United States Attorney for the
18 Southern District of New York

19 TODD BLANCHE

20 RUSSELL CAPONE

21 JOHN P. CRONAN

22 Assistant United States Attorneys

23 MURRAY RICHMAN

24 BRIAN PAKETT

25 Attorneys for Defendant

26 ALSO PRESENT: SHAWN MacDONALD, DEA
27 VANESSA QUINONES, Paralegal
28 DON TAYLOR, Paralegal

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Trial

1 THE DEPUTY CLERK: All rise.

2 THE COURT: Good morning, all. Good morning,
3 everyone.

4 MR. RICHMAN: Good morning.

5 THE COURT: We have circulated a verdict sheet that
6 reflects the separate questions that we talked about yesterday.
7 Counsel both accepted the formulation. And we'll mark that
8 court exhibit five and then use that for the verdict sheet for
9 the jury.

10 All right, gentlemen?

11 MR. BLANCHE: Yes, your Honor. Fine with the
12 government.

13 MR. RICHMAN: Yes, sir.

14 THE COURT: And we have kept the conspiracy charge as
15 we discussed yesterday, and added a paragraph with a separate
16 question of the consequence of the conspiracy.

17 There is murder and the question murder, and we have
18 circulated that particular charge. And I gather it was
19 acceptable to both sides.

20 Mr. Blanche?

21 MR. BLANCHE: Yes, your Honor.

22 THE COURT: Mr. Richman?

23 MR. RICHMAN: Yes, your Honor.

24 THE COURT: All right. So we're going to bring in the
25 jury. Brigitte, ready.

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Trial

1 THE DEPUTY CLERK: Yes, your Honor.

2 All rise.

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Trial

1 (In open court)

2 (Jury present)

3 THE COURT: Good morning, ladies and gentlemen. Be
4 seated, please.

5 The lawyers will now give you the summations;
6 Mr. Cronan for the government, Mr. Richman for the defendant.
7 What they say is not evidence. It's their commentary, it's
8 their respective commentary as advocates on the evidence. They
9 have lived with the case a long time, they have strong feelings
10 about the case as they present their respective cases, but you,
11 the jury, have to listen to them and evaluate the case for
12 yourselves. In that way, the summations help by giving you the
13 lawyer's perspective in what they believe had been proved and
14 not proved in the case. You, ultimately, have to listen and
15 evaluate for yourselves, subject to the instructions of law
16 that I give to you immediately following the summations.

17 We'll start with Mr. Cronan.

18 THE COURT: What's going on?

19 MR. CRONAN: Trying to remove that little side of the
20 screen.

21 On a sunny afternoon, just over 13 years ago, the
22 quiet lobby of an apartment building in the Bronx rang out with
23 gunshots, fifteen gunshots in total, as two hired hitmen
24 brutally executed Arturo Cuellar and Ildefonso Vivero-Flores in
25 cold blood. Fourteen of those gunshots were fired by that man,

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Summation - Mr. Cronan

1 the defendant, Joe Fernandez. Nine of the defendants' bullets
2 riddled the body of Cuellar and Flores, leaving them lifeless
3 in a pool of blood on the floor of that apartment lobby.

4 The defendant fired bullets through Arturo Cuellar,
5 through his left shoulder, that pierced his lung, tore through
6 the left atrium of his heart, and lodged in his ribcage.

7 Other bullets fired by the defendant shot through
8 Flores' neck and penetrated his carotid artery and jugular
9 vein.

10 And the defendant fired multiple bullets into Arturo
11 Cuellar. One of those bullets shot up through his chest, went
12 through his lung, and lodged near his jaw.

13 Arturo Cuellar -- or Ildefonso Vivero-Flores and
14 Arturo Cuellar thought they were being escorted by Alberto
15 Reyes to an apartment in the building where they were going to
16 receive a payment for a huge drug deal.

17 Alberto Reyes was not escorting Cuellar and Flores to
18 be paid that afternoon, he was marching them to their
19 execution. And just moments after Cuellar and Flores entered
20 that apartment lobby, their executioners, Patrick Darge and Joe
21 Fernandez, emerged from a dark alcove off to the side,
22 approached their two victims and gunned them down.

23 Patrick Darge and Joe Fernandez shot Cuellar and
24 Flores as they were defenseless sitting ducks waiting for an
25 elevator, without even the slightest idea that two armed

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Summation - Mr. Cronan

1 killers were waiting for them to arrive.

2 Patrick Darge fired the first shot, but then his gun
3 jammed.

4 Joe Fernandez was there to finish the job, firing shot
5 after shot after shot, until he was sure that his two victims
6 were dead.

7 And you learned why these two men were killed on
8 February 22nd, 2000. They were killed for money, a lot of
9 money; millions and millions of dollars of drug money.

10 And you also learned why Joe Fernandez killed these
11 men. He also did it for money; \$40,000.

12 THE COURT: We have a technical issue. Every time
13 that something is flashing on the screen, there has to be some
14 reference in the record, otherwise there is no record for the
15 visual input.

16 So, Mr. Cronan, either you do it now, or you keep a
17 record of it and we'll do it later, but it must be done.

18 MR. CRONAN: Certainly, your Honor.

19 Joe Fernandez killed these men for money. He was paid
20 \$40,000 to take the lives of these two individuals.

21 THE COURT: Exhibit?

22 MR. CRONAN: Your Honor, would you like me to do it
23 after the closing?

24 THE COURT: Will it be done?

25 MR. CRONAN: Absolutely. Absolutely, your Honor.

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Summation - Mr. Cronan

1 THE COURT: Do you have a record of each one that has
2 been shown?

3 MR. CRONAN: Yes, your Honor. It is on Power Point,
4 and I will be able to provide that to the Court afterwards, and
5 provide a list.

6 Now, members of the jury, I'm going to talk this
7 morning about the evidence that you have heard throughout this
8 trial. And a lot of what you learned, really, was not in
9 dispute, or at least it doesn't seem to be.

10 So what does seem to be in dispute? The only real
11 dispute seems to be, first, whether there was a second shooter
12 on February 22, 2002, whether Joe Fernandez was that second
13 shooter. And he was.

14 So I'm going to spend my time this morning talking to
15 you about how we know the defendant was with Patrick Darge on
16 February 22nd, 2000. You know that in many ways. Several
17 members of this murder for hire conspiracy told you from an
18 insider perspective all about the murders.

19 People like Jeffrey Minaya, the leader of the New York
20 crew of drug traffickers, who was receiving cocaine from Arturo
21 Cuellar and Ildefonso Vivero-Flores, and who ordered the hit on
22 those two individuals.

23 People like Patrick Darge, the person who was hired by
24 Jeffrey Minaya's crew to kill Cuellar and Flores, and person
25 who recruited the defendant to be his second shooter.

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Summation - Mr. Cronan

1 Patrick Darge hired the defendant to have his back in
2 case something went wrong. And when something did go wrong,
3 Joe Fernandez sprang into action.

4 You also saw physical evidence from the crime scene.
5 Evidence that also corroborated Patrick Darge. We saw autopsy
6 reports of the victim that corroborated Patrick Darge's
7 explanation to you as to what happened during the murders and
8 also obviously confirmed that the two victims died.

9 But the way you know this man Joe Fernandez was the
10 second shooter, is not just from Patrick Darge, but you also
11 heard it from two people that the defendant confessed to after
12 the murders. His former cellmate at the Metropolitan
13 Correctional Center, Yubel Mendez and his other cousin, Alain
14 Darge.

15 So what did the evidence prove? For much of his life,
16 Jeffrey Minaya made his living trafficking cocaine. And in
17 late 1999, an opportunity presented itself for Minaya to become
18 a much -- even bigger player. And that was when he met a man
19 by the name of Poncho.

20 Poncho worked for an organization that was sending
21 huge quantities of cocaine to New York City by tractor
22 trailers. And Poncho, as you now know, his real name was
23 Ildefonso Vivero-Flores. And he is one of the other people,
24 the people, one of the two men that would be killed on
25 February 22nd, 2000.

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Summation - Mr. Cronan

Now, the time that Minaya met Poncho, Poncho was arranging for a huge shipment of some 400 kilograms of cocaine to come to New York City. Jeffrey Minaya and his crew got a big chunk of that cocaine, about 100 kilograms. And they sold it on the streets. Then it was time to pay Poncho and his organization. So Jeffrey Minaya sent one of his workers, by the name of Alberto Reyes down in McAllen, Texas where he paid Flores' organization more than a million dollars for some of the drugs.

Now around this time, Jeffrey Minaya also went down to McAllen, Texas. And he went down there to meet with Flores' drug trafficking organization, as well. And that is when Minaya met Flores' boss, Arturo. And you know who Arturo is, now. That's Arturo Cuellar. And he is the second man who would have been killed, that was killed, on February 22nd, 2000.

Minaya and Cuellar got together and they talked business. And it turned out to be the perfect business partnership. They have Arturo Cuellar with access to huge quantities of cocaine, and you have Minaya with the ability to sell the drugs in New York City. So they decided they would continue to work together. And they started talking about another shipment of cocaine that Cuellar was going to send to New York City, but this one would be entirely for Jeffrey Minaya and his crew.

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Summation - Mr. Cronan

In February of 2000, that second shipment of cocaine, some 274 kilograms of cocaine arrived in New York City. Arturo Cuellar and Ildefonso Vivero-Flores also came up to New York City. They came up to coordinate the arrival of the drugs and, also, to stick around to collect payment. And you see that because this cocaine was being provided to Jeffrey Minaya on what's called "consignment."

Minaya explained to you what this means. Jeffrey Minaya and his crew would receive the drugs. They wouldn't pay for it up front. They would take the drugs, sell it on the streets, collect money. And from those proceeds, they would then pay Cuellar and Flores some 7 to 10 days after the drugs arrived.

So there is 274 kilograms of cocaine arrived in New York City. Minaya and a bunch of his crew people you have heard about throughout this trial, Jose Rodriguez -- or Gordo, Alberto Reyes, Sonny Cruz, Manuel Suero, DiFrank Medina, all of these men started selling the drugs, and they started collecting the payments.

Meanwhile, Cuellar and Flores, they also stuck around New York City. They were anxious to get paid. Not surprising why they were anxious to get paid. Jeffrey Minaya told you that at the time Cuellar's organization was charging upwards ever \$24,000 per kilogram of cocaine. They had just brought 274 kilograms to Jeffrey Minaya. If you do the math, that's

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Summation - Mr. Cronan

1 upward of \$6.5 million that Minaya owed to Cuellar and Flores.
2 Of course they were going to stick around and make sure they
3 got that money.

4 So now, at this point, Jeffrey Minaya and his crew
5 were literally sitting on millions and millions of dollars in
6 cash that they owed to Cuellar and Flores. And as they were
7 sitting on this amount -- this pot of cash, Minaya and three of
8 his criminal associates, Gordo, Manuel Suero, and Alberto Reyes
9 got together and made a fateful decision, a decision that would
10 land all of us in this courtroom. They decided to kill Arturo
11 Cuellar and Ildefonso Vivero-Flores.

12 Now, their idea was a very simple one, but a very
13 profitable one. Instead of paying for the drugs, instead of
14 paying Cuellar and Flores the million dollars they were owed,
15 the millions of dollars that was owed, let's just kill them and
16 keep all of the money for ourselves.

17 Now, Cuellar and Flores were Minaya's drug connect.
18 Without Minaya's relationship with them, there wouldn't have
19 been this opportunity to steal all of this money. So Minaya
20 demanded the most. He wanted his cut to be \$3 million. The
21 other guys, Suero, Gordo, and Reyes, they would get paid a lot
22 by any measure, a little bit less, a little less than a million
23 dollars each.

24 So now at this point, these men had agreed to commit
25 the murders and it was time to put the plan in motion. The

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Summation - Mr. Cronan

1 plan had two parts. First, they would hire a hitman. And
2 second, they would lure the two victims, Cuellar and Flores, to
3 this apartment building in the Bronx, 3235 Parkside Place. And
4 they would bring them there with the ruse that they would be
5 receiving payment for drugs in an apartment in this building.

6 And of course you know what the plan really was. Once
7 Cuellar and Flores walked in, they would be killed.

8 Now, Gordo, Suero, and Reyes were tasked with hiring
9 the shooter. They needed to find someone who would be willing
10 to kill for money. And Gordo knew just the man for the job.
11 Patrick Darge.

12 Patrick Darge, in the year 2000, was a dangerous man.
13 He was a drug dealer. He was violent. About two years
14 earlier, he had killed another man with a gun. And Gordo knew
15 Patrick Darge well. They were cousins. They grew up together.
16 And Gordo suspected that Patrick Darge would be willing to kill
17 these two victims if he was given the right reason.

18 So the night of February 21st, 2000, Gordo gave
19 Patrick Darge that reason. Gordo called Patrick Darge and said
20 that he had something urgent he needed to discuss. Alberto
21 Reyes then drove Gordo, along with Manuel Suero, to go meet up
22 with Patrick Darge. They went to Darge's apartment building.
23 Darge came down and sat in the car with them. Darge was in the
24 back seat. Gordo was in the front passenger seat. And Gordo
25 made the pitch to Patrick Darge to get him to join the murder

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Summation - Mr. Cronan

1 plot.

2 Gordo told Patrick Darge that they had a problem.

3 That that problem was that they owed money to Jeffrey Minaya's
4 drug connect -- referring to the people who were supplying
5 Jeffrey Minaya with the cocaine, and that they didn't have the
6 money to pay that debt.

7 As a result, Gordo said the family was in danger.

8 Gordo claimed that the people knew where his mother lived. And
9 her life was at risk. They didn't have the money to pay for
10 the drugs. Gordo, Suero, and Reyes offered to pay Patrick
11 Darge to commit the murders, eventually offering \$180,000.

12 Patrick Darge needed a little bit of time to think
13 about the proposal. He was worried about the safety of Gordo's
14 mother, who was like a second mother to him. But make no
15 mistake, he was very enticed by the huge payment he was being
16 offered to do the job. After thinking about it for a bit,
17 Patrick Darge decided to commit the murders. But before he
18 called Gordo to confirm he was in, Patrick Darge made a few
19 calls of his own. This job was too risky for Patrick Darge to
20 do by himself. So he needed to assemble a team of his own.

21 First, Patrick Darge needed a back-up shooter. This
22 was a dangerous undertaking. And Darge needed someone that he
23 knew would have his back. And that person was the defendant,
24 Joe Fernandez.

25 Why did Patrick Darge turn to Joe Fernandez? He was a

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Summation - Mr. Cronan

1 man Patrick Darge could trust. They were cousins. Fernandez
2 looked up to Darge. Fernandez lived in a different area of the
3 Bronx at the time, so the others would not have suspected that
4 Darge called Joe Fernandez into the plot.

5 And there was another reason. Patrick Darge told you
6 that Joe Fernandez had a gun. Simply put, Patrick Darge knew
7 that the defendant was someone he could count on for this very
8 dangerous and very deadly job.

9 So the same night that Gordo reached out to Patrick
10 Darge and pitched the murder plot to him, Patrick Darge did the
11 same with Joe Fernandez.

12 Darge called the defendant, said he needed to speak
13 with him about something; went to the defendant's apartment
14 building over near the Major Degan; and the two of them met out
15 on the street.

16 And, ladies and gentlemen, that is when Joe Fernandez
17 joined the murder conspiracy. Patrick Darge explained to Joe
18 Fernandez that he was hired to murder two guys and he needed
19 help in that if anything went wrong. He asked the defendant to
20 back him up, and the defendant agreed.

21 Now that Joe Fernandez was on board, Patrick Darge
22 gave the defendant some more details. Darge offered to pay the
23 defendant \$40,000 to assist him. He told the defendant that he
24 would need to bring his own gun. And, again, Patrick Darge
25 made clear that the plan was to commit murders.

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Summation - Mr. Cronan

1 The defendant listened to Patrick Darge, thought about
2 it, and confirmed that he was willing to do whatever Patrick
3 Darge needed him to do. Patrick Darge had his back-up shooter,
4 but he needed someone else. He needed a get-away driver. And
5 for that, he turned to Luis Rivera. And he learned a little
6 bit about Luis Rivera. He was a drug dealer from the
7 neighborhood. He had committed crimes with Patrick Darge in
8 the past. He had driven Patrick Darge around in the past when
9 Darge was committing crimes. But not only did Patrick Darge
10 know that he could trust Luis Rivera for this job, Darge also
11 knew that Rivera had the perfect vehicle to serve as the
12 get-away car, a Ford Expedition that had a hidden trap in the
13 center console that could be used to hide their guns.

14 So now the same night that Patrick Darge reached out
15 to Joe Fernandez, he reached out to Luis Rivera. He explained
16 to Rivera that he was gonna be killing two people, and he
17 needed a driver. And he offered Rivera \$20,000 to be that
18 driver. And Rivera also agreed. And Rivera agreed to play
19 another important role. Patrick Darge did not have a gun at
20 the time. Rivera agreed to provide Patrick Darge with a gun to
21 use at the murders.

22 So now at this point, Darge had his back-up shooter
23 and his get-away driver. With his team assembled, Darge called
24 Gordo to meet up. Gordo returned a second time to Patrick
25 Darge's place that night, the night before the murders.

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Summation - Mr. Cronan

1 Patrick Darge confirmed that he was in. And they discussed the
2 details of the plan. The next day, Alberto Reyes would bring
3 the two victims to 3235 Parkside Place in the Bronx. Patrick
4 Darge and his other shooter would be waiting in the lobby of
5 that building. And when the victims were brought in, Patrick
6 Darge and the other shooter would be armed and ready to commit
7 the murders.

8 Now, the next morning, the morning of the murders,
9 Patrick Darge called Gordo to confirm that the plan was still
10 going forward, and it was. Patrick Darge called the defendant
11 and Luis Rivera to confirm that they were still on board, and
12 they were.

13 Meanwhile Alberto Reyes called the two murder victims,
14 Arturo Cuellar and Ildefonso Vivero-Flores, telling them that
15 he was going to be picking them up. They expected to receive
16 the payment for drugs that day. Cuellar and Flores were at a
17 barber shop getting their hair cut that morning. It was
18 downtown.

19 Reyes went down there, picked them up and drove them
20 to 3235 Parkside Place. And at the same time this was
21 happening, Luis Rivera picked up the defendant and Patrick
22 Darge, and also drove them to 3235 Parkside Place. During this
23 drive, Rivera opened up the secret compartment in his Ford
24 Expedition and handed Patrick Darge the handgun that he had
25 brought for him. Darge took out the gun, removed bullets from

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Summation - Mr. Cronan

1 the gun, wiped down the bullets so there were no prints, and
2 put the bullets back in the gun.

3 In the back seat of the car, Joe Fernandez took out
4 his gun; it was in a duffel bag. And assembled it. And as
5 they drove to the murder scene, Patrick Darge once again went
6 over the plan with the defendant and Luis Rivera.

7 The defendant's job was to back up Patrick Darge
8 during the shooting. And Luis Rivera's job was to wait around
9 the block, ready to drive away once Darge and the defendant
10 finished the job.

11 So Luis Rivera parked, went around the corner near
12 Decatur and 207th Street. Before getting out of the car, Darge
13 again reminds Rivera to remain alert in case he needed to make
14 a quick getaway. And at that, Patrick Darge and Joe Fernandez,
15 wearing hoodies to conceal their face, gloves to make sure they
16 didn't leave any fingerprints, and with guns concealed, walked
17 from Rivera's car to the entrance of 3235 Parkside Place, and
18 went into the lobby.

19 They entered the lobby and looked around. They
20 checked for any security cameras. There didn't seem to be any.
21 They looked around for any other exits. And they waited in the
22 side mailbox area, a little bit off to the left of the
23 entrance. At this time, Patrick Darge had his pistol concealed
24 in his jacket in his pocket, and Joe Fernandez had his gun over
25 his shoulder, concealed under the jacket he was wearing. And

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1 they waited.

2 While Darge and Fernandez waited, Darge called Gordo
3 to see where the victims were. Gordo told Darge that Reyes was
4 driving the two victims over to the apartment building. And
5 they were almost there. Gordo also explained that he was
6 located at a McDonalds over near Gunhill Road and Webster
7 Avenue and, from that location, he would be able to see Reyes
8 as he drove by with the victims. And then a little while
9 later, Gordo called Patrick Darge and said the victims would be
10 there momentarily.

11 Patrick Darge and the defendant then got ready. Darge
12 told the defendant to get ready for this. They pulled the
13 hoods over their heads and they waited. Reyes parked near 3235
14 Parkside Place and walked into the apartment building with
15 Cuellar and Vivero-Flores.

16 Reyes walked up to the elevator of the apartment
17 building with Cuellar and Flores standing next to him at the
18 time. And then Patrick Darge, with his gun in hand, emerged
19 from the mailbox area, with the defendant following right
20 behind him. Darge walked up to the first victim, Arturo
21 Cuellar, and fired a single gunshot into Cuellar's head, right
22 behind his ear. At this point, you learned Alberto Reyes heard
23 the gunshot and ran up the internal stairwell of the apartment
24 building. Darge then turned to another victim, Ildefonso
25 Vivero-Flores, and tried to fire, but he didn't fire. His gun

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Summation - Mr. Cronan

had jammed. Darge tried to clear the jam quickly, he was not able to, and he ran out of the building.

But, Joe Fernandez whose job it was to take care of anything, take care of things if anything went wrong, did his job. Joe Fernandez had fired 14 shots, 9 of them entered the bodies of Cuellar and Flores, leaving them dead in the apartment lobby.

And as Patrick Darge was running out of the building, you can still hear some of those gunshots. Darge ran to the corner of Decatur and 207th Street, where Rivera was in the Ford Expedition waiting. Patrick Darge got in the car and they waited for the defendant to arrive. And once the defendant caught up with them, they drove away.

Now, during that drive, Patrick Darge asked the defendant what took so long, why were you not right behind me. And what the defendant said was he had to make sure they were both dead. And Darge also yelled at Luis Rivera for giving him a gun that had jammed.

The police soon arrived at the scene. Officer Joe Szaniszlo told you what he saw when they got there. Two men, Cuellar and Flores, lying dead in a pool of blood. They were just to the left of the elevator. Cuellar was lying a bit on top of Flores, and there were shell casings throughout the lobby.

Dr. Suzanne Ely, of the New York City Medical

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Summation - Mr. Cronan

1 Examiner's Office testified and told you about the injuries
2 that these two individuals suffered.

3 Arturo Cuellar suffered four gunshot wounds; one
4 gunshot was fired at very close range into his head and pierced
5 his brain, the other three bullets were fired into Cuellar's
6 back, and one of them lodged near his jaw.

7 And Dr. Ely also told you that Cuellar sustained
8 bruising near his cheekbone, the bridge of his nose and his
9 brow. And what that indicated was that Cuellar fell face
10 first, after he was shot, onto the ground, and didn't brace his
11 fall. He was likely unconscious at that point.

12 Dr. Ely told you that Ildefonso Vivero-Flores suffered
13 six gunshot wounds. One of the bullets entered the back of
14 Flores' left shoulder. That one traveled downward. It pierced
15 a number of vital organs; his lung, his heart, his liver and
16 eventually lodged near his ribcage.

17 Another bullet was fired into Flores' left shoulder as
18 well. And that one also lodged in his ribcage. And the other
19 gunshot wounds included gunshot wounds to the left side of
20 Flores' neck and, also, the left side of his face.

21 And one of the gunshots to Flores' face pierced his
22 voicebox, his right carotid artery, which is a major artery in
23 the neck, and his jugular vein, which is a major vein in the
24 neck.

25 Dr. Ely testified that all 10 of these shots, the four

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Summation - Mr. Cronan

shots that went into Cuellar, the six shots that went into Flores traveled from left to right, which means the shooter was likely shooting from the left side of him, obviously. And that makes sense. Patrick Darge explained to you, and you also heard this from Alberto Reyes, that he and the defendant approached their victims from the left. And, obviously, to state what I think is clear, Dr. Ely concluded that these gunshot wounds were the cause of death for both Cuellar and Flores.

Now that Patrick Darge and Joe Fernandez had done their job, now that they had killed Cuellar and Flores, it was time for them to get paid. And Alberto Reyes paid Patrick Darge about \$180,000, the agreed-upon amount. Reyes took that money and paid Joe Fernandez \$40,000 he was owed, and Luis Rivera the \$20,000 he was owed. And then a little bit later, Manuel Aladino Suero paid Patrick Darge another \$10,000. So, in total, Patrick Darge made about \$190,000. And then Jeffrey Minaya, Gordo, Suero, and Reyes, split the rest of the money, and a few other people. Minaya made a few -- he said a little over a million dollars down in the Dominican Republic, he had his buddy Richard Correa retrieve some of the money that he had hidden in a car that he parked in the Bronx.

Now, like I said at the beginning of my summation, a lot of the evidence in this trial does not seem to be in dispute. I don't think there is any real dispute that in the

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Summation - Mr. Cronan

1 late 90s to early 2000s Jeffrey Minaya would become a huge
2 cocaine trafficker. And I don't think there is any dispute
3 that the two murder victims, Cuellar and Flores, worked for the
4 Mexican drug trafficking organization that was supplying
5 Minaya's crew with huge amounts of cocaine. And, I don't think
6 there is any dispute that those two men were murdered on
7 February 22nd, 2000, or why they were murdered. They were
8 murdered because they supplied Minaya with 274 grams of
9 cocaine, and Minaya's crew didn't want to pay the money, they
10 just wanted to keep it all for themselves. There is no real
11 dispute, I don't think, that Patrick Darge was one of the men
12 hired to kill Cuellar and Flores.

13 So what is in dispute. And, really, there seems to be
14 two main things; first, was there a second shooter with Patrick
15 Darge on February 22, 2000, and second, was that second shooter
16 Joe Fernandez.

17 So let me spend a little bit of time focusing on those
18 two issues.

19 How do you know Patrick Darge did not act alone on
20 February 22nd, 2000.

21 As Judge Hellerstein has told you, and I suspect he
22 will tell you again, the government has the burden in this case
23 and we welcome the burden. The defense doesn't need to say a
24 word, they don't have to make any arguments. But if, as here,
25 the defense does make arguments, you should scrutinize them and

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Summation - Mr. Cronan

1 assess them, just like you scrutinize the government's
2 arguments.

3 In his opening statement, Mr. Richman argued that
4 Patrick Darge made up the presence of a second shooter on
5 February 22nd, 2000, because Darge wanted to gain favor with
6 the government, he wanted to get a lighter sentence.

7 And then when Mr. Richman cross-examined Officer
8 Szaniszlo on the first day of the trial, he then suggested that
9 Officer Szaniszlo's report indicated there was only one
10 shooter. Now, I don't know if the theory is going to continue
11 to be pursued by the defense, but let me be clear, the theory
12 is absolutely absurd.

13 First of all, Officer Szaniszlo's report, which I have
14 in evidence, does not state that there was just one shooter.
15 Quite the opposite. The report makes very clear that there may
16 have been one or more perps involved in the shooting.

17 Officer Szaniszlo had no idea how many people were
18 involved in the shooting. How could he have? He had just
19 arrived on the crime scene. He found two dead bodies on the
20 floor of the apartment building lobby. His job was to secure
21 the evidence and to secure the crime scene. He was not -- he
22 didn't see the shootings, he was not involved in the
23 investigation.

24 But, you did hear from people who saw the shootings,
25 were involved in the investigations, and even who planned the

d350fer1

Summation - Mr. Cronan

1 murders. And all that evidence confirms without a doubt that
2 there were two shooters on February 22nd, 2000.

3 (Continued on next page)

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D35VFER2

Summation - Mr. Cronan

1 MR. CRONAN: For example, Patrick Darge testified not
2 only that there was a second shooter, Joe Fernandez, but why he
3 needed a second shooter. He needed someone to have his back;
4 someone he could trust in case something went wrong.

5 Alberto Reyes testified that when he walked the
6 victims into the lobby of the apartment building, he saw two
7 individuals off to the left. He said one of them was Patrick
8 Darge; he couldn't make out who the second person was. But
9 Reyes told you that he saw them emerge from the mailbox area
10 towards the victims, and then he heard a gunshot, and he ran up
11 the steps.

12 Geffrey Minaya testified that he learned from Gordo,
13 whose job it was to recruit the hitman, that there would be two
14 shooters.

15 And then you have all of the ballistics evidence that
16 was recovered from the victims at the crime scene.

17 Now, you have these in evidence. This is Exhibit 60;
18 it has two bullets that were recovered from Flores's body; 61
19 is one bullet from Cuellar's body; and 62 includes 15 shell
20 casings, eight bullets, and one full cartridge that was
21 recovered from the crime scene.

22 Detective Salvatore Lacova of the NYPD's firearm
23 section testified. And he told you about the ballistics
24 analysis he performed on these bullets and shell casings; and
25 his conclusion, that at least two guns were used on February

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Summation - Mr. Cronan

1 22nd, 2000.

2 Now Detective Lacova explained to you every barrel --
3 every gun has a unique barrel. And in that barrel are unique
4 impressions that are created on bullets. They are called
5 striations. So you are able to tell if multiple bullets were
6 fired from the same gun based on the unique striations that are
7 found in the bullets. And he also told you that every shell
8 casing fired from a gun is unique, as well. When a gun is
9 fired, unique impressions -- they are called firing pin and
10 breechface impressions -- are left on the shell casings that
11 are discharged from a gun.

12 So Detective Lacova looked at the crime scene
13 evidence.

14 Let's start with the 11 bullets that were recovered,
15 the three from the victims, and the eight from the crime scene.
16 One of those bullets was too deformed to do an analysis, but
17 nine of the bullets -- all nine of the .380 caliber bullets --
18 were fired from the same gun. One bullet, it was a
19 nine-millimeter bullet, was fired from a different gun. And
20 then Detective Lacova looked at the shell casings found from
21 the crime scene. Fourteen of the shell casings were fired from
22 the same gun. They were all .380 caliber shell casings. And
23 the other shell casings, the nine-millimeter shell casing, was
24 fired from a different gun.

25 And that's all consistent with what you also heard

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Summation - Mr. Cronan

1 from Detective Daniel Austin. Detective Austin told you that
2 recovered from the crime scene were 14 .380 caliber shell
3 casings, and one nine-millimeter shell casing.

4 The analysis of this ballistics evidence leaves no
5 doubt whatsoever that at least two guns were used on February
6 22nd, 2000.

7 There were two shooters that afternoon. Darge was one
8 of them. How do you know Joe Fernandez was the second shooter?
9 Again, of course, we start with Patrick Darge.

10 Patrick Darge walked you through exactly what Joe
11 Fernandez did. He explained to you how he recruited Joe
12 Fernandez the night before; he explained to you why he went to
13 Joe Fernandez; he explained the money he offered Joe Fernandez
14 to be his back-up; he told you what Joe Fernandez's role would
15 be, to have his back in case anything went wrong; and when
16 something did go wrong, Patrick Darge explained to you that he
17 ran out of the building and heard gunshots continued to be
18 fired. And then, moments later, Patrick Darge explained to you
19 that Joe Fernandez told him that he stuck around in the lobby
20 to make sure that the two victims were dead.

21 Patrick Darge's testimony about what the defendant did
22 was credible, coherent, and consistent with all the other
23 evidence you saw in this case.

24 What was that other evidence? Let me walk you through
25 some more.

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Summation - Mr. Cronan

Now, you repeatedly heard that the second shooter was going to be Patrick Darge's cousins; you heard that from Geffrey Minaya and Alberto Reyes. Geffrey Minaya told you that right before the murders, Gordo, who was one of the people responsible for hiring the hitmen, told Minaya that the other shooter would be one of Patrick Darge's cousin.

Minaya testified also that Manuel Suero, another person who's responsible for hiring the shooters, told him that Patrick Darge was going to bring one of his cousins to the murders.

And then Alberto Reyes, the third person responsible for hiring the hitmen, told you that Patrick Darge told him that he had recruited his cousin for the hit.

So the second shooter was Patrick Darge's cousin. And you've heard a mountain of evidence that the defendant and Patrick Darge are cousins; their grandmothers are sisters, and there really hasn't been any dispute about that. You've heard this from Patrick Darge, from Allen Darge; and the defendant also told his cellmate at the MCC, Yubel Mendez, that he and Patrick Darge are cousins.

And talking about the MCC, you have Joe Fernandez's statement as to Patrick Darge the day he arrived at the jail. Now, if you remember, Patrick Darge was already incarcerated at the MCC the day that Joe Fernandez arrived. When Patrick Darge saw Joe Fernandez arrive on the floor, Darge approached him.

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Summation - Mr. Cronan

1 Defendant wanted no part of Patrick Darge; just kept saying,
2 Why, why, why.

3 The defendant was then brought to his own cell.
4 Patrick Darge explained to you that that was a cell that the
5 defendant shared with an inmate named Mendez. Patrick Darge
6 explained that he then went over to Mendez's cell and brought
7 the defendant over to his own cell where they spoke for about
8 20 minutes to a half hour.

9 And here's what Patrick Darge explained to you they
10 discussed in his cell: The defendant asked Darge why he turned
11 him in. Defendant said, Nobody knew me; why did you do that?
12 None of them could have identified me.

13 Darge first pointed out that other people could have
14 identified him, but then admitted that he was the one who
15 turned the defendant in.

16 Now, you learned about this interaction at the MCC not
17 just from Patrick Darge, but also from that inmate that Patrick
18 Darge mentioned, that inmate Mendez. That was Yubel Mendez,
19 Joe Fernandez's cellmate, for a brief period of time in the
20 MCC.

21 Mendez saw the defendant arrive on 5 North, and saw
22 Patrick Darge approach the defendant. And, then, after the
23 defendant was brought to Mendez's cell, Mendez recalls that
24 Patrick Darge took the defendant from his cell into Patrick
25 Darge's own cell where they spoke for about 20 minutes.

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Summation - Mr. Cronan

Now, let me talk a little bit more about what you learned from Yubel Mendez. Mendez's testimony was overwhelming evidence of the defendant's guilt. Make no mistake. Mendez and defendant shared a jail cell together at 5 North; they got to know each other; Mendez helped the defendant out a bit; and every night the two of them talked regularly.

What were some of the things that you learned that the defendant said to Yubel Mendez?

For one, the defendant told Yubel Mendez that he considered fleeing to the Dominican Republic to avoid arrest. Mendez had mentioned to the defendant that he had been arrested in the Dominican Republic.

And what was the defendant's response? The defendant said that he thought about running away to the Dominican Republic so he wouldn't be arrested. The defendant had assumed that he couldn't have been arrested in the Dominican Republic.

Mendez told the defendant, Well, that's wrong; I've been arrested in the Dominican Republic. And you know what? If the federal authorities are looking for you, they are going to find you.

And what was the defendant's response to Yubel Mendez? Oh, well, then it wasn't worth it for me to go there; they were going to catch me anyway.

Now, let's think about that for a minute. Why would the defendant have been thinking about going to the Dominican

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Summation - Mr. Cronan

1 Republic? Why would he have been thinking about fleeing there
2 if not to avoid getting arrested for a crime that he had
3 committed? Why would he have been concerned that the
4 authorities might come looking for him if not for the fact that
5 he realized he committed a crime and was worried it was going
6 to get solved?

7 Keep in mind, ladies and gentlemen, that at this point
8 the charges against the defendant were sealed. The parties
9 stipulated to this. That means until the defendant was
10 arrested, the defendant would not have been able to view or
11 access his charges. At the time the defendant was thinking
12 about going to the Dominican Republic, he would have had no way
13 of knowing whether charges were filed against him.

14 But what did he know? He knew he had committed a
15 serious crime with Patrick Darge many years earlier. And he
16 knew there was a chance the police would eventually catch him.
17 That is why he wanted to go to a place like the Dominican
18 Republic where he thought he couldn't get arrested.

19 And, members of the jury, one of the most important
20 things that Yubel Mendez told you that defendant said to him,
21 Joe Fernandez told you about Mendez, why he was in prison. He
22 confessed. Now, the defendant didn't tell Mendez every single
23 detail about what he did, but he told him more than enough.
24 Fernandez explained that he was in jail because of his
25 participation with Patrick; that's, of course, Patrick Darge.

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Summation - Mr. Cronan

1 And that Darge brought him into it. And the defendant
2 explained that Patrick had called him so they could get
3 together, and that Patrick told him to bring a weapon.

4 And what the defendant told Mendez happened that
5 Patrick brought him into this, and Patrick Darge told him to
6 bring a weapon, is exactly what happened:

7 On February 21st, 2000, the night before the murders,
8 Patrick Darge reached out to the defendant, said I need you to
9 help me out with this; I need you to have my back, and I need
10 you to bring your gun.

11 How would Yubel Mendez have known these details unless
12 the defendant told him?

13 You learn that Patrick Darge never told Mendez about
14 Joe Fernandez before Fernandez arrived on 5 North. There's no
15 evidence either on direct or cross that Mendez knew any details
16 of the case. Mendez simply told you what Joe Fernandez told
17 him.

18 And, by the way, when the defendant was telling you
19 about Mendez, why was he in jail, did he say, I'm in jail
20 because I was framed? I'm in jail because I was set up? No.
21 He told Mendez why he was in jail, because he committed a crime
22 with Patrick Darge.

23 And you also have Joe Fernandez's confession to Allen
24 Darge. In no uncertain terms the defendant also confessed to
25 Allen Darge the very day that he learned the police were

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Summation - Mr. Cronan

1 looking for him. And you learned yesterday what happened that
2 day. Law enforcement officers were looking for the defendant
3 the morning of October 13, 2011. Officer Washington told you
4 that very early that morning, around 5 or 5:15 a.m., they went
5 to their first location where they thought he might be, a house
6 in Chester, New York. The defendant wasn't there, but his
7 mother-in-law was there. And then about 20 minutes later, the
8 officers went to another address in Woodbury, New York, and
9 Officer Washington spoke to the defendant's wife.

10 Now, the defendant also wasn't there at the second
11 address, but Officer Washington explained that from the imprint
12 on the driveway, it appeared that a car had just left. And
13 then, just a few hours later, Joe Fernandez called his cousin,
14 Christian Guzman, a gentleman who testified yesterday. The
15 defendant told Guzman that he was coming over to his apartment.
16 He called him up. These are the phone records for Christian
17 Guzman. And see here that's his phone number: 917-826-1095.

18 And these phone records, which you'll have when you
19 deliberate, show that at 12:22 p.m. on October 13th, 2011, the
20 day the police were looking for Joe Fernandez, Christian Guzman
21 received a call from the defendant, and they have three more
22 calls in the next four minutes.

23 And just so we're completely clear, this number here,
24 917-826-1095, that's Guzman's number; he told you that and you
25 have the subscriber records. That number was called by this

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Summation - Mr. Cronan

1 number, 845-492-0601. And the parties have stipulated that
2 that number, 845-492-0601, is a number that Joe Fernandez was
3 using on October 13, 2011.

4 So just a few hours after the police arrived at his
5 house, Joe Fernandez called Christian Guzman. And like I said,
6 you have these phone records in evidence and you should look at
7 them. And I expect that when you look at them, you will see
8 that the phone records cover August to October 2011. Over that
9 three-month period, there are no other calls between that
10 number for Joe Fernandez and Christian Guzman other than on
11 this day.

12 Joe Fernandez was reaching out to Christian Guzman
13 because there was something urgent they needed to discuss. And
14 you know what was so urgent. The police were looking for him.
15 The defendant came to Guzman's house and said he needed to
16 speak to Allen Darge. And when Guzman testified yesterday and
17 was thinking about that day, he told you the defendant may have
18 told him that it was about Allen Darge's brother Patrick. And
19 you know that it actually was. When the defendant came there,
20 that was what he wanted to talk to Allen Darge about.

21 Now, let me remind you again, at this point, the
22 charges against the defendant were sealed. Again, you have
23 this stipulation. The charges were sealed until October 18th,
24 2011. Until that date, the charges cannot be viewed or
25 otherwise accessed by members of the public, including Joe

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Summation - Mr. Cronan

1 Fernandez or his attorney. The defendant went to Christian
2 Guzman's house five days earlier, and he needed to speak with
3 Allen Darge about Patrick Darge. The defendant knew the police
4 were looking for him. Police came to his house earlier that
5 day. But the charges were sealed. The police never told
6 Christian Guzman's family why they were looking for him. At
7 this point, there would have been no way of knowing -- of the
8 defendant knowing why the police were looking for him; no way
9 except his own realization that they must have been looking for
10 him for the crime he committed with Patrick Darge many years
11 before.

12 So Guzman called Allen Darge -- so defendant is at
13 Christian Guzman's house. He called Allen Darge, Guzman called
14 Allen Darge and said, Come on over.

15 Darge came over; Allen Darge came over. Guzman, I
16 believe he testified, he jumped in the shower and started to
17 get ready. And then the defendant and Allen Darge got together
18 on Guzman's couch in the living room and had a conversation.
19 They spoke in low voices. Guzman couldn't hear what they were
20 talking about, but Allen Darge told you what they talked about.

21 The defendant told Allen Darge that he learned that
22 police had come to his house looking to pick him up, and he
23 knew why. He figured that Patrick Darge had told the
24 authorities about him. And the defendant was looking for
25 advice from Allen Darge on what he should do.

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Summation - Mr. Cronan

1 Now, Allen Darge tried to calm the defendant down. He
2 told the defendant that a lot of people know about this; maybe
3 it wasn't my brother who talked to the police about you. Allen
4 Darge asked the defendant about who else might have known about
5 his involvement in the crime.

6 The defendant mentioned that Zac was there, and he was
7 driving the day of the murders. Zac is Alberto Reyes. And,
8 again, that's a detail that only someone involved in the
9 murders would have known. How was Allen Darge able to tell you
10 about that if the defendant didn't tell that to him, and the
11 defendant knew that to be true, because the defendant was
12 there.

13 And most importantly, members of the jury, that
14 afternoon in the living room of Christian Guzman's apartment,
15 the defendant confessed to Allen Darge. Allen Darge told you
16 that the defendant said he fired his gun twice, and then his
17 gun jammed, and Patrick Darge finished the job.

18 Now, you know from the ballistics evidence and Patrick
19 Darge's testimony pretty much the opposite happened: Darge
20 fired the first shot, and then Joe Fernandez fired the rest.

21 MR. RICHMAN: Objection.

22 THE COURT: Members of the jury, you'll evaluate the
23 evidence yourself. Counsel are advocating from their
24 respective positions.

25 You'll decide what's accurate and what's not accurate

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Summation - Mr. Cronan

1 and what it means.

2 Objection overruled.

3 MR. CRONAN: Allen Darge explained that Joe Fernandez
4 said he fired two shots and his gun jammed, and Patrick Darge
5 fired the rest. The testimony from Patrick Darge and the
6 ballistics evidence suggested the opposite happened. Darge
7 fired the first shot, nine-millimeter, and that Joe Fernandez
8 fired the remainder. Maybe Allen Darge remembered the details
9 a little bit wrong from that conversation, maybe Joe Fernandez
10 was trying to minimize his role, who knows.

11 What matters is that Joe Fernandez confessed to Allen
12 Darge in the living room of Christian Guzman's apartment the
13 day the police were looking for him.

14 At the end of the conversation with Allen Darge, Darge
15 gave the defendant about \$200 and a throwaway phone, it was one
16 of the phones that Allen Darge had used in his drug dealing.
17 And the defendant left and said, I'm not going to tell on
18 anyone.

19 Now, members of the jury, I want to spend one more
20 minute on this incident at Christian Guzman's apartment, this
21 incident on October 13, 2011.

22 Really think carefully about what happened that day.
23 This is devastating.

24 The police first went to a house in Chester, New York
25 looking for the defendant. He wasn't there; his mother-in-law

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Summation - Mr. Cronan

1 was there. They went to a second house, the defendant's house.
2 He had just left. And then just a few hours later, the
3 defendant reached out to his cousin, Christian Guzman; goes to
4 Guzman's house and needed to speak with Allen Darge about
5 Patrick.

6 Why did he do that? Because he immediately knew not
7 just that the police were looking for him, but why they were
8 looking for him. They were looking for him because of the
9 murders he committed with Patrick Darge. The charges weren't
10 public yet. The police didn't tell the defendant's family why
11 they were looking for him. He wouldn't have known why they
12 were looking for him. But they were looking for him because
13 Patrick Darge had ratted on him. If not for the fact that he
14 knew he committed that crime, there was no other way for him to
15 know that.

16 In his opening statement, Mr. Richman told you that
17 aside from the word of Patrick Darge and the admission of
18 Boozer, that's Allen Darge, there's no evidence of connecting
19 the defendant to this crime. First of all, even if that were
20 true, that's a lot. You got a statement, you got testimony
21 from the other person who was involved in the shooting with the
22 defendant, and you have testimony from someone the defendant
23 confessed to. That's more than enough.

24 But that's not all you have, and you now know that
25 that's the case. You have everything I just went through: The

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Summation - Mr. Cronan

1 testimony that Patrick Darge and had recruited his cousin for
2 the hit; testimony that Patrick Darge and the defendant were
3 cousins; the defendant's statements to Darge at the MCC; the
4 confession to Yubel Mendez; the confession to Allen Darge;
5 Guzman's testimony that corroborated the confession to Allen
6 Darge.

7 The evidence establishing Joe Fernandez's guilt of the
8 murders on February 22nd, 2000 is overwhelming.

9 I want to take a few minutes to briefly shift gears
10 and discuss with you the crimes that you will be considering
11 later on today.

12 In a little bit, Judge Hellerstein will instruct you
13 on the law. And just to be completely clear, what the judge
14 tells you the law is is what controls. I expect I know what
15 the judge will tell you, but if there is anything different
16 between what I say and what the judge tells you, listen to him.

17 THE COURT: Nobody knows what I'll say.

18 MR. CRONAN: In case I haven't been clear, he's the
19 boss.

20 All right. So the defendant has been charged with two
21 counts.

22 Count One, a murder-for-hire conspiracy. And what
23 does this entail? There are two elements to the conspiracy
24 part:

25 First, the existence of the conspiracy to commit a

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Summation - Mr. Cronan

1 murder for hire. And a conspiracy is simply an unlawful
2 agreement between two or more people to break the law. And in
3 this case, the object of the conspiracy is to commit a murder
4 for hire.

5 Second part, Joe Fernandez knowingly joined that
6 conspiracy, was he a member of that conspiracy.

7 So this starts with the question of what constitutes a
8 murder for hire.

9 Now, here are the elements for a murder for hire:

10 The first two elements are related. First is the
11 defendant or another member of the conspiracy --

12 THE COURT: Talk about the evidence. Leave the
13 instructions to me.

14 MR. CRONAN: Certainly, your Honor.

15 One of the reasons we repeatedly ask witnesses on the
16 stand whether the cell phone you used was able to call out of
17 state -- it probably seemed like an odd out-of-the-blue
18 question that we ask -- was because one of the things you'll be
19 asked to decide is whether or not used in the commission of the
20 crime was a cell phone that was capable of making interstate
21 calls. And you've heard repeatedly that numerous members of
22 this conspiracy had a cell phone that they used in connection
23 with the crime that was capable of making interstate calls.

24 You had Geffrey Minaya talk about the cell phone he
25 used to stay in contact with the murder victims to coordinate

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Summation - Mr. Cronan

1 with Gordo and Reyes in the planning of the murder. Patrick
2 Darge talked about him using his cell phone; he used it to
3 reach out to Joe Fernandez and Luis Rivera recruit them into
4 the plot; he used them the day of the murders to coordinate
5 with Gordo and to coordinate with Fernandez and Rivera the day
6 of the murders.

7 Another example, Alberto Reyes. He told you that he
8 was using his girlfriend Gloria Trujillo's cell phone the day
9 of the murders. These are records for a cell phone used by
10 Correa Trujillo, and the parties stipulated that the cell phone
11 was operated by a network capable of making interstate
12 communications.

13 And you also learned that, for purposes of the
14 murder-for-hire count, that it was a murder for hire. Several
15 conspirators in this murder paid Patrick Darge to commit the
16 murders. Patrick Darge paid Joe Fernandez to be his back-up;
17 paid Luis Rivera to be the getaway driver. And Patrick Darge
18 specifically told Joe Fernandez the day he recruited him that
19 he had been hired to kill these two men.

20 It was a murder-for-hire conspiracy. And the
21 defendant joined that conspiracy. He knew what the purpose
22 was. He knew the purpose was to kill two men. He knew his
23 role was going to be the back-up in case something went wrong.
24 He agreed to that. And when something went wrong, he killed
25 those men; he joined that conspiracy.

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Summation - Mr. Cronan

1 And I also expect you'll be asked if you find that the
2 defendant joined the murder-for-hire conspiracy, whether or not
3 death resulted. And I think that's pretty obvious. You have
4 Dr. Ely's testimony about the reason that Arturo Cuellar and
5 Ildefonso Vivero-Flores died that day. They died from gunshot
6 wounds inflicted by the defendant, Joe Fernandez.

7 And to be clear, although we prove that the defendant
8 fired the gunshots that killed the two victims, we're not
9 required to. It's not required that the defendant actually
10 fire any of the gunshots. We don't have to prove that the
11 defendant shot anyone or who he shot or if the person died from
12 the shot fired by the defendant. We proved all that, but it's
13 not necessary. The question is simply whether there was -- the
14 defendant was a member of a conspiracy to commit a murder for
15 hire, and whether someone's death resulted. That's all.

16 And then the second count that the judge will tell you
17 about is using a firearm in connection with a crime of
18 violence. And I think the proof here was pretty obvious, as
19 well. The defendant brought his own firearm to the offense; he
20 used it in connection with a crime of violence, a
21 murder-for-hire conspiracy. This was a murder. The very
22 purpose of the defendant and Patrick Darge were in the lobby of
23 3235 Parkside Place was so that these two individuals would be
24 killed. They were waiting in the dark alcove for their victims
25 to arrive. The plan was once they arrived, to kill them.

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Summation - Mr. Cronan

1 That's exactly what happened.

2 And again, although with respect to the second count,
3 the use of a firearm in a crime of violence with death
4 resulting, we prove that the defendant shot and killed Cuellar
5 and Flores on February 22nd, 2000.

6 But I expect that you'll learn that the defendant also
7 can be guilty under aiding and abetting liability. And what
8 that means is that the defendant did not have to pull the
9 trigger himself. All that is necessary is that the defendant
10 willfully and knowingly associated himself in some way with the
11 crime of carrying a firearm during the murder conspiracy; and
12 that he intentionally and knowingly committed some act to help
13 cause the murders.

14 Now, again, we proved way more than that. We proved
15 that the defendant actually pulled the trigger and killed the
16 two victims. I just want to make clear that there was this
17 alternative way for the defendant to be guilty, as well.

18 Now, I want to take a few minutes and talk to you
19 about some of the government's witnesses in this case.

20 THE COURT: I think you've been going over this in
21 more detail than is necessary. When you talk too much, you
22 lose attention.

23 MR. CRONAN: Apologize, your Honor.

24 THE COURT: You've already been talking over an hour.

25 MR. CRONAN: I'm sorry?

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Summation - Mr. Cronan

1 THE COURT: You've already been talking over an hour.
2 It's getting repetitive.

3 MR. CRONAN: Your Honor, I will try to wrap it up
4 then, briefly as I can.

5 THE COURT: That's a good idea.

6 MR. CRONAN: Before I do that, and I believe this is a
7 separate topic, I want to talk to you about the cooperating
8 witnesses.

9 You heard from people who committed very serious
10 crimes, there's no question about that. And you heard
11 Mr. Richman during his opening and during his cross-examination
12 of these witnesses. He doesn't want you to believe them; he
13 doesn't want you to believe them because they are criminals.
14 Let me be clear: No doubt they are criminals. Each of these
15 individuals have pled guilty for crimes, and they will be
16 sentenced for them.

17 You know, instead of these six witnesses, we would
18 have loved to have called law-abiding citizens who never so
19 much as jaywalked, but it doesn't work out that way.
20 Law-abiding citizens don't import huge shipments of cocaine,
21 they don't agree to murder other drug dealers.

22 The fact of the matter is to get to the heart of a
23 criminal enterprise is often necessary to get that information
24 from someone who is involved in that crime, someone who is in
25 that organization. And you heard from people who knew about

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Summation - Mr. Cronan

1 the crimes that brought you here, people who knew those crimes
2 inside and out.

3 The question is not whether they are criminals; of
4 course they are. The question is whether, when they took that
5 witness stand, did they tell you the truth. And I want you to
6 consider a few things when you think about that.

7 First, what are the consequences for these witnesses
8 if they were to lie to you? You heard about the cooperation
9 agreements they entered into; you heard all about these 5K
10 letters, the letters they'll get at sentencing. That letter
11 will tell the sentencing judge about the assistance they
12 provided and ask the judge to consider that assistance when
13 sentencing them. That's a huge benefit.

14 But they have far more to lose from lying. If they
15 lie, they will not get that letter; they will be facing a
16 mandatory minimum sentence, a huge sentence for many of them,
17 for three of them, mandatory minimum sentence of life. And
18 they won't be able to withdraw their guilty plea.

19 Read their cooperation agreements. They are all in
20 evidence. They have to disclose and testify -- disclose all of
21 their crimes and testify truthfully.

22 And what if they don't? Here's language from one of
23 the agreements: All bets are off. They don't get that 5K1
24 letter. They're subject to the mandatory minimum sentence.
25 And if the government already submitted that 5K1 letter, we

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Summation - Mr. Cronan

1 could withdraw it.

2 THE COURT: That doesn't sound like wrapping up.

3 MR. CRONAN: Your Honor, it's --

4 THE COURT: I know. But it doesn't sound like
5 wrapping up.

6 You can't spend six days summarizing six days.

7 MR. CRONAN: Your Honor, I didn't think I was going on
8 for that long, but I will try to wrap up very quickly here.

9 The other way you know these individuals are telling
10 you the truth is not just from the consequences they would face
11 from lying, but because each and everything these witnesses
12 told you was corroborated by other evidence. And I will really
13 go through this quickly; I know you've all been paying
14 attention throughout this trial.

15 First, you have the roles of Gordo and Reyes.

16 Repeatedly witnesses told you what that role was. Patrick
17 Darge told you that Gordo recruited him to be the hitman, and
18 Reyes was the one who brought the victim to the lobby. And you
19 heard the same thing from Geffrey Minaya, from Alberto Reyes.
20 And Alberto Reyes even told you about the car he drove, his
21 girlfriend's red Acura; even his girlfriend told you about
22 that.

23 You learned about the trap in Luis Rivera's
24 Expedition. You learned about that not just about Patrick
25 Darge, you learned about that from the person who installed the

D35VFER2

Summation - Mr. Cronan

1 trap, Richard Correa.

2 THE COURT: Mr. Cronan, wrap it up please.

3 MR. CRONAN: Members of the jury, everything you heard
4 from these cooperating witnesses, whether it be facts like
5 this, or trap in the Expedition, or whether or not the
6 defendant was a person who committed the crime, everything you
7 heard has been corroborated by other independent evidence.
8 That's how you know they were telling the truth. Witness after
9 witness would have had to take that stand and lie to you for
10 the defendant not to be guilty.

11 At the beginning of this trial, my colleague,
12 Mr. Capone, asked you to pay close attention to the evidence
13 and to use your common sense. Use your common sense. Does it
14 make sense that every single witness took that stand and lied
15 to you in complete disregard for the consequence of lying. Is
16 it a coincidence that their testimony was corroborated by other
17 evidence? Of course it's not.

18 And when you carefully evaluate their testimony and
19 the evidence that you saw throughout this trial, there is one
20 conclusion, and there is only one conclusion that the evidence
21 and the law compel. And that conclusion is that the defendant
22 is guilty as charged.

23 THE COURT: Thank you, Mr. Cronan.

24 It would probably be a good idea to have a break
25 before you start, Mr. Richman.

D35VFER2

Summation - Mr. Cronan

1 Members of the jury? Yes. Okay.

2 Close up your books; leave them on your chair.

3 (Jury excused)

4 THE COURT: Mr. Richman, do you need Mr. Fernandez
5 here while you take a break?

6 MR. RICHMAN: I need a two-minute break.

7 THE COURT: You can have more than that, but I'm
8 asking should Mr. Fernandez be brought back or stay with you?

9 MR. RICHMAN: Stay here, if it's at all possible.

10 THE COURT: He can stay here, then I'll stay here,
11 too.

12 The government wants a break, they can break.

13 MR. CRONAN: Thank you.

14 (Recess)

15 (Jury present)

16 THE COURT: We're now going to hear Mr. Richman
17 present the summation for defendant, Joe Fernandez. And then
18 there will be a very, very, very short rebuttal, Mr. Cronan,
19 very short. I will then give you the instructions, and then
20 we'll break for lunch. So it may be a while before you eat.
21 It's necessary for me to deliver the instructions before we
22 break for lunch.

23 Mr. Richman, please.

24 MR. RICHMAN: Your Honor, attorneys for the
25 prosecution, attorney for the defense, Joe Fernandez, ladies

D35VFER2

Summation - Mr. Richman

1 and gentlemen of the jury, this will be the last time I will
2 address you. What I say is not evidence, and what the
3 government has said is not evidence either, what they view the
4 evidence to be.

5 This was a hard-fought case, and it's not as simple as
6 it sounds.

7 Yes, we agree on a lot of things.

8 Thirteen years ago, two people were killed, two drug
9 dealers were killed in the Bronx. We acknowledge that. We
10 acknowledge that Patrick Darge had something to do with it. We
11 acknowledge Geffrey Minaya is a major drug dealer.

12 Where our point of contention is is we don't know what
13 happened because we were not there, I wasn't there, you weren't
14 there, and neither was Joe Fernandez.

15 We made suppositions based upon the evidence as it
16 come forth. They were with the witnesses for years; they had
17 25 and 50 and 30 and 10 and 16 meetings with them I did not
18 have. And each and every single time when they had a meeting
19 and we hit a point, boy would they back off that point.

20 To start with, I want to start at the end.

21 They showed you the stipulation in which on October
22 13th they went to Joe's mother-in-law's house to look for Joe,
23 and he wasn't there. Well, I'm not at my mother-in-law's house
24 either. They then went to his house, and the person was
25 honest, she doesn't know where the person went, Ms. Washington,

D35VFER2

Summation - Mr. Richman

1 but they saw an impression. Later on they learned that he had
2 gone to work. But they tried to make more of it and make it
3 into an issue of flight. And I'll deal with the concept of the
4 issue of flight later on.

5 They raised the concept that how would he know that
6 they were looking for him, how. Joe Fernandez, when he was
7 arrested, spoke to Patrick, and Patrick said he wrote a letter
8 to his grandmother, and Joe had seen the letter. And that's
9 part of the discussion. They made no mention of that. They
10 made you believe that somehow he knew in his head what they
11 were looking for. And that's not true. They told you what
12 they wanted to tell you.

13 And just look at the evidence; it's there. You can
14 ask it to be read back; you can ask him -- if you have
15 recollection, you can point it out in your head, because he
16 said -- Patrick said -- I wrote the letter to grandma; I had to
17 rat you out. I had to rat you out?

18 This is a case about a very manipulative man, a
19 terrible human being, in all aspects of his humanity. We're
20 speaking of Patrick Darge. Patrick Darge never did a decent
21 thing in his life. He robbed, he told you about that; he
22 stole, he murdered. We only learned about it now. But he made
23 a deal with the government that he wouldn't lie. That's beyond
24 belief in and of itself.

25 The government introduced in evidence the agreement

D35VFER2

Summation - Mr. Richman

1 that they had. You saw the agreement. And these says, by God,
2 if he lies, he'll pack in the whole deal.

3 Patrick Darge has gone through this before. They
4 didn't introduce the 2003 agreement, I did. And it's in
5 evidence. And in that particular agreement, it has the same
6 language. It tells you that if he's caught lying, they'll take
7 the deal away from him.

8 Here, you can take a look here. Take a look at the
9 date, right in front of you. That's the date. March 27, 2003.
10 And then in that agreement it is understood that he would tell
11 the whole truth. And if he didn't tell the whole truth, the
12 government would not give him this deal. And they even went to
13 bat for him. They went overly to bat for him. They made
14 references to this wonderful human being, except that he lied.
15 He lied.

16 How do you know he lied? He never told them about his
17 brother Boozer, the one that he and his brother Boozer seem to
18 agree that they disagree, but everybody else says they worked
19 as a team. The same brother Boozer who was a witness in this
20 case. He didn't tell the government about Boozer at all. When
21 he was sworn to tell the truth, he didn't tell the government
22 about the several murders he had committed.

23 What did the government do? Did they pull back the
24 other deal, as they said they would do with anybody who lies?
25 Did they do that? They didn't do that. They gave him another

D35VFER2

Summation - Mr. Richman

1 deal. Fool me, once shame on me; fool me twice, shame on you.

2 The government bought into this. And they bought into
3 this, and they put him on the stand, and they ask you to
4 believe him, and believe him without question. Why? Because
5 he signed an agreement. If you believe Patrick Darge, you
6 believe Buffaloes have wings; and Buffaloes have wings, you
7 better walk around with an umbrella.

8 The first witness of any significance was Geffrey
9 Minaya. Geffrey Minaya was a drug dealer. He was another
10 horrible human being. I never said he lied; I just said he's a
11 horrible human being.

12 I asked him a question: Have you ever done anything
13 decent in your life?

14 He said, No, I'm a crook, I'm a thug, I'm a gangster.

15 I used those very words. He said that's what he was.

16 But thing he doesn't know, he doesn't know Joe
17 Fernandez; never had any contact with Joe Fernandez. Joe
18 Fernandez never sold drugs to him.

19 He knew Patrick Darge, and he knew Patrick Darge as an
20 enforcer. What does enforcer mean to you? A person who helps
21 you across the street?

22 And we're talking \$180,000 for the murder. And this
23 Mr. Geffrey Minaya was going to steal three million of this
24 drug money. Does he know who the shooter is? Sure he knows.
25 Patrick was the shooter. Who did he believe was the second

D35VFER2

Summation - Mr. Richman

1 shooter? Mrs. Minaya's own testimony, you can have it read
2 back, Allen Darge, Boozer. And that's in the testimony.

3 So what and how does Darge protect the only person he
4 seems to have a degree of loyalty to, his brother? Because he
5 didn't even testify against his brother the second time he
6 became the cooperator. When he went into this agreement on the
7 tenth -- 2010, Darge, Allen Darge, had not yet been arrested in
8 2012, and he was not arrested as a result of what his brother
9 testified to, but on a separate deal entirely. How does that
10 strike you? Does that strike you as being truthful?

11 Geffrey also mentioned that the other shooter, if it
12 was not Darge, is his cousin, Patrick Darge's cousin. Do you
13 know what the cousin's name is? Tilo. Tilo. And that's in
14 your record. And Tilo's name is Joe Agramante. He had killed
15 somebody else with and for on another occasion, the man who he
16 shot in the face. When I asked him in the eye? No, I just
17 shot him in the face. That was an accident. I didn't mean to
18 shoot him in the face.

19 He minimizes Patrick Darge. He's a manipulator and
20 he's a manipulator, and that's the whole case.

21 You know, in this particular case, when they arrested
22 Joe Fernandez or came to arrest Joe Fernandez, the only person
23 testifying in this entire case who would have been the only
24 witness as against Joe Fernandez was Allen Darge --
25 withdrawn -- Patrick Darge. Only one. Everything was added

D35VFER2

Summation - Mr. Richman

1 onto later to buttress the case. And the only thing you add
2 onto that diminishes it adding onto it, is the truth. And that
3 is the truth.

4 He lied then and he lied now.

5 Another person who testified during the course of this
6 case was Zac, one of the planners of this murder. And it was
7 interesting to know how Zac was woven into the testimony of
8 Boozer at the end.

9 If you recall what Boozer said, Well, Zac knew.

10 Well, the fact is Zac doesn't know my client. Zac sat
11 on the stand. He said on testimony that Joe Fernandez told him
12 about the fact that Zac drove him to the scene. This was in
13 Boozer's testimony. We know that's not true. We know that
14 can't be true, because Zac was the person in the hallway with
15 the two Mexican drug dealers. He says that Zac must have told
16 about Joe. But Zac didn't know Joe. Zac sat on the stand; he
17 sat there for half a day, looked around the courtroom, didn't
18 know Joe Fernandez.

19 So what are we back to? We're back to Patrick Darge.

20 Patrick Darge tells you that the reason he planned the
21 way he planned it, because he's a guy who gets things done.
22 He's a dude who gets it done, his words. And although he had
23 never planned the murder before, he didn't even have to see the
24 scene of the crime, nor did he have to do anything. But he was
25 polishing bullets so that his fingerprints wouldn't be on them.

D35VFER2

Summation - Mr. Richman

1 He was saying at the initial stage that the .380 was
2 his. And how do we know it was his? He says it himself. His
3 gun jammed, something that the prosecution left out when they
4 talked about the ballistics person. The gun jammed. There's
5 evidence of one bullet that jammed. That discharged a live
6 shell. The cartridge that fell on the floor. And was that?
7 The .380. And that's in the testimony. It's there.

8 So whose gun? That was Patrick's gun that jammed,
9 .380, 14 shots by him alone.

10 What are we talking -- it makes no sense. You can't
11 twist the truth and make it something -- what it's not.

12 I'm not saying that the prosecution has any
13 bad-intended people, but they buy into their witnesses. You
14 get attached to a witness, and then you get his story, and you
15 start building on his story; and that story becomes the real
16 story. But that's not the real story. And you got to see the
17 inconsistencies. And if it's inconsistent in one, it's
18 inconsistent in all.

19 I asked you at the beginning, at the opening, if you
20 would buy a watch from a person who would lie to that extent.
21 And I'm asking you -- you don't have to shake your head or
22 anything -- but think to yourselves now, if you met Patrick
23 Darge, aside from knowing what he does and being fearful of
24 him, as you would be, would you trust him? Would you trust his
25 word for anything in life? And yet you're here to trust and

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Summation - Mr. Richman

1 give another man's life into his hands and, thus, into yours?
2 Would you do that? If that's what it all is about, then
3 there's no sense in jury trials and just buying whatever they
4 say.

5 We know Patrick Darge met with the government 25
6 times, at least, after he agreed to cooperate this time. He
7 knows how it works. He knows that he has to be believed. He
8 knows what's important to him.

9 Another point. After the shooting, all the persons
10 who made money on the shooting, all the persons who benefited,
11 all the persons who did everything, all went to the DR. They
12 all did. It's the testimony. Boozer, who's not supposed to be
13 speaking to his brother Patrick at the time, went with Patrick
14 to the DR. It's in the testimony. The only person who said
15 they were not getting along was Patrick and Boozer, thereby
16 buttressing their testimony. They went to the DR.

17 Was Joe Fernandez there? No. Did anybody in this
18 case, other than those -- Patrick, Boozer, who were cousins,
19 and Mendez, who was in the same cell, know Patrick -- know Joe
20 Fernandez? No. No mention. Nothing. It's like all these bad
21 characters in a bad movie pointing the finger at the only good
22 guy in the entire courtroom. And that's insane.

23 Did I make efforts to show you that he was a good guy?
24 Yes. I'm not going to mislead you, I did do that. I wanted to
25 show you that 14, 13 years ago he was 24 years ago -- obviously

D35VFER2

Summation - Mr. Richman

1 if he's 37 now, you can infer that it was 13 years ago -- that
2 he had a child, then he has four children now, and we saw his
3 wife, who's a nurse. You saw that they have a home, and they
4 have a decent life.

5 Did I do it to get sympathy? Quite possibly. I'm not
6 going to lie. But also to show the difference. From the tree
7 you shall know the fruit. From these bad apples, these
8 horrible human beings, you cannot get honesty out of them, you
9 cannot use their word to condemn another human being. If you
10 do so, you do the wrong thing.

11 Patrick Darge was almost creepy in his delivery. He
12 sat there -- and he's a preacher, too, he tells you. He runs a
13 church in the MCC. He's a preacher. He's the one you turn
14 your money over to if you have tithing. And would you put the
15 money in his hands? He found a new scam. Remember his brother
16 Allen said that he had white collar crime? Yeah, it was credit
17 card fraud, and selling drugs, and murder.

18 Minaya told you that Boozer and Patrick worked
19 together "as a team."

20 (Continued on next page)

21

22

23

24

25

D350fer3

Summation - Mr. Richman

1 MR. RICHMAN: Whoa else is gonna back you up but your
2 team member, your brother.

3 Patrick says, I got someone who no one else would
4 know. And then he goes out and gets a driver that everybody
5 knows.

6 And where was the driver? Did you hear him testify?

7 The whole case is Patrick Darge, and that's all it is.
8 He is here, my client is here because he is charged with a
9 serious crime. He is also here because he has sat in the very
10 courtroom where we are standing in, that he is not guilty, and
11 that's why we have this trial.

12 You know, you sit down and write a summation, you
13 literally write it out, you write it out from beginning to end,
14 and then you don't use it. You don't go through it because you
15 don't know, you want to be able to finish in time, you want to
16 be able to not waste the Court's time or waste your time. You
17 know where you're going. But what I'm trying to do is point
18 out the indiscretions, the mistakes, the lies; just the
19 wrongdoings.

20 You know, this agreement which the government has
21 introduced on everybody else's behalf, take a look at it
22 yourself. You can take it in and look. But the one that I
23 introduced, also, is the government's agreement in the
24 year 2003. And he broke every aspect of that agreement and,
25 yet, notwithstanding, the government wants you to rely upon

D350fer3

Summation - Mr. Richman

1 this man's word.

2 One thing that Patrick did say, though, was quite
3 interesting. He says that Joe speaks English, he doesn't speak
4 Spanish. What was significant about that? And that was in the
5 testimony, by the way. And what was significant about that?
6 It was Mendez said that he spoke to him in Spanish.

7 And I asked him, didn't you tell someone at one time
8 that he didn't speak Spanish very well? I never said that. I
9 must have gotten it from someplace. But the fact of the matter
10 is, you know what the story is.

11 Let's talk about Mendez for a moment. Mendez has
12 nothing do with this drug deal at all. He has his own drug
13 deal. He is a different dealer, entirely. And he is on the
14 same floor with Patrick Darge, and they're friends, and they
15 are both informants, and they both have cooperated with the
16 government. And Patrick says to the guard, put him in his
17 cell. Because he is the preacher, he gets along, the guard
18 doesn't care, sure, put him in Mendez' cell. And Mendez will
19 have you believe that after four, five days, the silent one,
20 Joe Fernandez, who Patrick called him the silent one, is now
21 spilling his guts to this man. But he never says that he shot
22 anybody. That's also in the testimony. He is saying oh, I was
23 going to go to the Dominican Republic. He's never been there.
24 There is no testimony he was ever there.

25 And but you know what was so interesting that they

D350fer3

Summation - Mr. Richman

1 didn't mention to you? The government somehow comes to Mendez
2 8 months after Joe Fernandez was no longer his cellmate. Now,
3 what could motivate them to come, eight months later, for a guy
4 who was in your cell for five days, who had so much to spill
5 about the guy right away. The one connection, the singular
6 connection, Patrick Darge.

7 Patrick Darge says, look, man, you can buttress me.
8 You can reasonably infer he is saying this. You can make me
9 look good and get some points for yourself. You could help the
10 government in this case. Because, let's face it, absent that,
11 absent Mendez and absent Alain Darge, there is no other case
12 but Patrick Darge. And Patrick and Alain work as a team. So
13 they through Mendez in to buttress the situation. Frankly
14 speaking, that's it. If you look at it that way, that is it.

15 You know, I can't even tell you whether Boozer is the
16 second shooter, because I don't know. I can't tell you whether
17 Joe Agramante is the second shooter, because I don't know. I
18 can't even tell you if Zac may have had a gun and shot one
19 person one time, and then ran up the steps to the fourth floor
20 where the trap was, where the narcotics and the money was. I
21 can't tell you that.

22 I can tell you the one thing, though, that, you know,
23 Darge, Patrick Darge, didn't even remember the scene of where
24 he killed two people. Remember, he got in there and said I
25 don't recognize this building. Not only does he not recognize

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Summation - Mr. Richman

1 the building, it was a flat street, and here we have he is
2 running up the hill. The picture shows the hill. But he
3 doesn't have any recollection of that. But everything else,
4 what he wanted to recollect, he recollects as he makes it up as
5 he goes along.

6 Even the story is beyond belief. That he gets called
7 from Gordo in the night before to come meet him. And one
8 person it says, Zac says they met him at Valentine Avenue,
9 Patrick Darge says Homestead Avenue in front of a one-family
10 house, rather than the apartment house. These are two
11 different stories. And there is no mention, at least in Zac's
12 story, about some family troubles. Or was that Darge making
13 himself look good and buttressing himself.

14 But, you know, the government showed you telephone
15 numbers, as the persons calling other persons, to show you
16 there is a connection. One thing they didn't show you -- in
17 fact two things they didn't show you. In fact, I can show you
18 a lot of things they didn't show you. But they showed you the
19 day when Christian Guzman and Joe Fernandez spoke to each
20 other.

21 Can that be put up possibly, the telephone record for
22 that day? Christian Guzman.

23 THE COURT: What's the exhibit number?

24 MR. RICHMAN: Sorry? 113.

25 THE COURT: Please put up 113.

D350fer3

Summation - Mr. Richman

1 MR. RICHMAN: And highlight the four calls. And can
2 we actually put the four calls like you displayed them before?

3 They got the telephone numbers --

4 THE COURT: Wait a minute.

5 MR. RICHMAN: They got the telephone numbers, right --

6 THE COURT: No, they'll put it up for you, hold it.

7 It's on the jury screens, please.

8 Do you see the telephone numbers up there. They
9 show -- I'm sorry -- Joe Fernandez calling Mr. Guzman. Mr.
10 Guzman calling Joe. Joe calling Mr. Guzman. And Joe calling
11 Mr. Guzman. Where do they show Mr. Guzman calling Alain Darge.
12 It's not there, is it? Certainly not highlighted? Certainly
13 not included. It's not there. Stretch it all you want, it's
14 not there.

15 They go back and show Gloria's phone. Gloria had
16 nothing at all to do with my client; she was Zac's girlfriend.
17 There's phone numbers and calls to her from Zac. If they could
18 do that, why didn't they go back and show why Patrick Darge
19 called Joe Fernandez, then? Where are the records of that
20 call? Where are they? Where is the evidence? Where is the --
21 any hard evidence attaching Joe Fernandez to this case. A
22 fiber. They got five fingerprints in this case, not any
23 belonging to Joe Fernandez. They got no fibers, no blood
24 spattering, no anything. Not even the telephone numbers, which
25 they made such a big deal out of. No connection to Joe

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Summation - Mr. Richman

1 Fernandez.

2 But they took what he wanted, that which they thought
3 would establish guilt. And I submit to you, it does not
4 establish guilt.

5 Reasonable people have to have a reasonable doubt.
6 And that's all there is, a reasonable doubt. That is all what
7 our system is based on. Absent that, absent that, we have no
8 system whatever.

9 You know, my associate brings to my attention that
10 Mr. Darge's testimony, Patrick Darge, is how he first met with
11 Gordo and Zac and Aladino. All of these guys have guns that --
12 they are arsenals, they are walking -- even his brother,
13 Boozer, 30 guns. But he -- he is the killer, but he doesn't
14 carry a gun. He has to have other people bring him the guns.
15 Stretch out this imagination. Stretch out the beliefs. And
16 it's just not true.

17 How could you plan this murder in one day without ever
18 going to the scene? How do you do this? And the person who is
19 going with you has never explained anything to you. It's your
20 brother, your brother knows what to do.

21 My mother used to tell me an expression --

22 Judge, you may remember this expression, although you
23 are not my mother.

24 THE COURT: Judge doesn't remember any expressions.

25 MR. RICHMAN: A half truth is a whole lie.

D350fer3

Summation - Mr. Richman

1 THE COURT: That's a good one, a half truth is a whole
2 lie.

3 MR. RICHMAN: A half truth is a whole lie. And you
4 can't build a foundation on a series of half truths.

5 THE COURT: My mother never said that.

6 MR. RICHMAN: I'll tell you about it later. I bet you
7 she did.

8 THE COURT: Usually she caught me more red-handed than
9 that.

10 MR. RICHMAN: You know, we all got along together very
11 well; spoke nicely with the prosecution; they were respectful
12 to me. And, it's a pleasure to work with persons who are
13 professionals. But it's not a pleasure to work with such
14 pressure on you. It's not a pleasure to work when you are
15 giving human beings who are sitting there -- every one of those
16 witnesses, would you just take them home? Would you rely upon
17 them for anything in life?

18 You know, Mr. Darge, Patrick Darge, fooled the
19 government once, and he's fooling them again, and he is fooling
20 you, and he has done that before, as well. And I speak to you
21 as individuals, but you as jurors. We're dealing with a human
22 being here. We are dealing with, really, serious consequences.
23 But those consequences are not yours to concern yourself, only
24 the judge.

25 But the view of the evidence, and no matter how you

D350fer3

Summation - Mr. Richman

1 view the evidence, it comes out in one way. You know, words
2 out of this man's mouth, Patrick Darge says: You know how easy
3 it is to pull the trigger?

4 Do you remember those words? And apparently it is
5 just as easy for him to lie.

6 You know, I can go on and I don't want to. I've gone
7 on, covered the evidence as best I can. I thought that I've
8 answered the government's queries well.

9 The scientific evidence in this case is minuscule.
10 Yes, we have a doctor to tell you what happened. Interestingly
11 enough, we made a stipulation about the height of the party,
12 said the 5-foot 8. The reason being, is the testimony of the
13 medical examiner said that the taller of the two persons who
14 died was 5-foot 8. And Patrick Darge said, on direct
15 examination and cross-examination, that he -- he shot the
16 bigger guy in the -- the right side, indicating the right side
17 of his head. And then Zac said that the first guy who got shot
18 doubled over -- you saw him on the stand -- doubled over,
19 holding his stomach. And that if you recall, was the
20 testimony.

21 Zac said anything he wanted, he didn't remember.
22 Darge says anything he wanted, because he wants you to forget.
23 He wants you to follow his word. And this is what it's all
24 about, nothing more.

25 You know, they bring Richard Correa on the stand.

D350fer3

Summation - Mr. Richman

Richard Correa had nothing at all to do with Joe Fernandez. He didn't even mention a word about Joe Fernandez. He didn't even acknowledge that Joe Fernandez is a person he knew, was even in the courtroom. But, again, you keep adding to numbers. And when you seem to have numbers, you saw pictures of all of the persons, and they listed all of these persons. And half of them didn't even know my client. And, certainly, Zac didn't.

And that's how Alain Darge got bollixed up. He made reference to the fact that Joe came to him and said to him, you know, I'm in trouble because of your brother. And the words he used was: I'm puzzled. If you recall, have it read back. I am puzzled.

And then he -- Alain Darge, defending his brother said, no, it's probably Zac. Because Zac said he drove you to -- that's not true. We mentioned that, I don't have to repeat that. That's the testimony they asked you to rely upon. Because without these late add-ons, these late so-called what they claim to be admissions, there is no case. You wouldn't give five minutes to the testimony of Patrick Darge without those add-ons.

Mendez is helping Darge, Darge is helping Mendez. Both of whom will get credit for cooperating with the government. As Alain Darge would. Alain Darge was not involved. He was not in jail at the time that my client went to see him allegedly. This is a year and a half after his

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Summation - Mr. Richman

1 brother was in the jail, when his brother supposedly had
2 cooperated, such a long period of time, giving up all of the
3 people that he had. He had no one to give up anymore. He had
4 nobody else, so he gave up Joe Fernandez. He had to have,
5 because everybody else, he put in jail. Except his brother.

6 One funny exchange, just to lighten this burden up.
7 When Zac said we could have killed him; you know, we could
8 have killed them. And the judge leaned over and said: Or not
9 kill them. And Zac said: No, no, kill them.

10 So casual. So kill him. I've rambled on about
11 enough. I can't go on more than this.

12 Let's talk a moment about this concept of flight.
13 Flight, supposedly, is indicative of the consciousness of
14 guilt. A man gets a visit from the police. He gets it on
15 October 13th, which is a Thursday. On the following Tuesday,
16 he surrenders with his lawyer to the authorities. Is that
17 flight? Anybody with any degree of intelligence knows if
18 somebody is looking for you, you go with your lawyer because
19 that would be a foolish thing not to do it. It is not
20 consciousness of guilt, it is not flight.

21 Now, the concept of flight does not even contemplate
22 what occurred in this particular case. And to use that as a
23 way to buttress their position on the fact that he is somehow
24 guilty because of this, is really very -- well, cheesey, if you
25 say so.

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Summation - Mr. Richman

1 There is a story I like to tell, and I'll tell this in
2 termination of this little talk.

3 There is a wise man sitting at the side of a road
4 giving wisdom to the people talking to them. And there was a
5 bully who came there. We'll call him Patrick for a moment.

6 And Patrick walked up to this wise man and said to the
7 wise man: Wise man --

8 Grabbing a pigeon.

9 -- is this pigeon alive or is he dead?

10 And he put his hands behind his back, knowing full
11 well if the wise man said alive, he will crush it and it would
12 be a dead pigeon.

13 If he said dead, he would let the pigeon, and let the
14 wise man look like a fool.

15 He said the only thing he could say: My son, you have
16 a life in your hands.

17 I say that to you.

18 Thank you.

19 THE COURT: Thank you, Mr. Richman.

20 Rebuttal, Mr. Cronan?

21 MR. CRONAN: We agree, don't invite Patrick Darge into
22 your house. If he comes knocking at your door, I want you to
23 close that door, dial 911, and call the police. Because
24 Patrick Darge is in jail for murder.

25 This case is not about silly questions like that.

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Summation - Mr. Richman

1 Those are distractions to get you to look away from the
2 evidence. This case is about whether Patrick Darge and the
3 other witnesses told you the truth from that witness stand.

4 Now, I know I don't have a lot of time, I apologize
5 I'm speaking fast, especially to the court reporter, but I want
6 to try to hit a bunch of points, because Mr. Richman repeatedly
7 misstated the evidence during that summation. And I want to
8 point out a few to start.

9 First of all --

10 THE COURT: Mr. Cronan, I'll give you the time,
11 don't --

12 MR. CRONAN: You will? Thank you.

13 THE COURT: As long as you don't over do it.

14 MR. CRONAN: I appreciate that.

15 First of all, Mr. Richman indicated that Patrick
16 Darge, somehow, the reason his client knew that there was
17 charges against him, because Patrick Darge wrote to his
18 grandmother and told his grandmother about the charges.

19 THE COURT: Mr. Cronan, slow down. Relax. If you --
20 if you are speaking too rapidly, none of your points will be
21 heard.

22 MR. CRONAN: Got it.

23 THE COURT: Take fewer points, and make them
24 understood.

25 MR. CRONAN: Mr. Richman suggested that Patrick Darge

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Summation - Mr. Richman

had called his grandmother -- had written to his grandmother, and that is how his client found out that Patrick Darge was cooperating and talking about the defendant. That is not the testimony.

There is absolutely no testimony, evidence whatsoever, that Patrick Darge told his grandmother that he was talking about Joe Fernandez. You need to base your deliberations, your decision, on what the evidence is, not on what Mr. Richman just speculated the evidence was.

And the reason he speculated about that is pretty obvious. The fact that the charges against Joe Fernandez were sealed, is devastating. There is no way that Joe Fernandez knew the police were coming after him. He knew why they were, unless he knew that he committed the crimes.

And I'll give you another example, very quickly, to start. Mr. Richmond claimed that there was testimony that Patrick Darge said that Joe Fernandez did not speak Spanish. That's just untrue.

How about your conversations with Joe, were they in Spanish or English. Patrick Darge said that he spoke to Joe Fernandez in English. He didn't say Joe Fernandez didn't speak Spanish. There was no testimony, at all, saying -- from Patrick Darge, saying Joe Fernandez didn't speak Spanish. Yubel Mendez, of course, told you that he did.

Now, it shouldn't be surprising that Mr. Richman spent

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Summation - Mr. Richman

1 most of his summation calling Patrick Darge a liar, who got
2 away with it. Why do I say that? Because if you believe
3 Patrick Darge, if you credit his testimony, Mr. Richman's
4 client is guilty. The defendant is guilty. That's it.
5 Period.

6 So let me talk a bit about Patrick Darge. First of
7 all, did he get away with it? He got a light sentence last
8 time around, sure. But did he get away with it?

9 He has pled guilty to committing three murders. He is
10 in jail right now for those murders. He is facing mandatory
11 life imprisonment. The only way he does not get life
12 imprisonment is if he tells the truth. And even then, as he
13 told you, the judge doesn't have to give him a break. It's up
14 to the judge. And the judge will know everything. He will
15 know about those three murders, everything that Patrick Darge
16 did. Is that a deal? Come in, meet with the government, tell
17 us about all your crimes, tell us about all your murders, tell
18 us about -- plead guilty to a murder you were not even charged
19 with. Talk about all of your family members, agree to testify
20 against your family members, testify against anyone we possibly
21 tell you, and then maybe, just maybe, you may get a break in
22 your sentence. But you know what? The one way you are not
23 gonna get a break, the one way you know you are going to jail
24 for the rest of your life, is if you lie.

25 Patrick Darge told you he knew nothing about the

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Summation - Mr. Richman

1 evidence in this case. He had not seen the discovery. He
2 didn't know what the other witnesses said to him. Does it make
3 sense that he would just take the risk that what he told you
4 was consistent with the rest of the evidence? Take the risk
5 that, hopefully, I got it right? Because if I don't, I know
6 I'm going to jail for the rest of my life? It doesn't.

7 Throughout this trial, we've heard a lot about whether
8 there was a second shooter, and who it was. Initially, there
9 was not a second shooter. Now the defense believes there is.
10 But guess what? It is everyone you could imagine, except for
11 the one person against whom there is overwhelming evidence,
12 except for the one person against whom the other shooter
13 testified against, except for the one person who confessed to
14 two individuals.

15 First we heard about another cousin named Tilo. And,
16 again, let me correct the record here. Jeffrey Minaya never
17 testified that he was told Tilo was the shooter, he thought
18 Tilo was the shooter. He said the opposite. Jeffrey Minaya
19 didn't say that. Did you see any evidence that Tilo was the
20 other shooter? No. None. What you did see was that Patrick
21 Darge told you that he had fingered Tilo in another murder.
22 Darge isn't afraid to point the finger at Tilo if he is guilty,
23 he did it before. He didn't do it here, because it wasn't
24 Tilo. And then, briefly, you heard it may have been Alberto
25 Reyes. That lasted for not very long, because it was obvious

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Summation - Mr. Richman

1 Alberto Reyes was not the other shooter. And now, finally, the
2 defense found the real shooter, Alain Darge.

3 Again, there was no evidence that Alain Darge was the
4 second shooter.

5 First of all, again, I need to correct the record
6 here. Jeffrey Minaya did not testify that he believed that
7 Alain Darge, that he thought Alain Darge was second shooter.
8 He thought about it initially. But then it -- he was told it
9 was one of Patrick Darge's cousins. That is the testimony.
10 That is the testimony that is before you. Not what Mr. Richman
11 just told you. What he just told you was not accurate.

12 So maybe -- so now the theory is Patrick Darge framed
13 his brother, Alain Darge. And think about that theory for a
14 bit. Maybe at first it might make sense, Alain Darge was a
15 criminal. But does it? So for that to be true, Joe Fernandez
16 would be the luckiest man on this planet; working stiff,
17 unlucky cousin of Patrick Darge was randomly fingered by Darge
18 as a killer to cover up his brother? If that were true, then
19 Patrick Darge and Alain Darge had to get together at some point
20 and agree that they would frame Joey Fernandez.

21 So when did this happen? Well, it had to happen
22 before 2010, right, because Patrick Darge told you the day he
23 was arrested. Was it right at the murders? Well, let's put
24 aside the fact that you heard that Patrick Darge and Alain
25 Darge were not even talking that day. They committed the

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Summation - Mr. Richman

1 murders. And then Patrick Darge says to Alain Darge, here's
2 what I would do if I ever get caught by the feds. First time
3 around, I won't tell them about the murders and hope they don't
4 find out. But if they do eventually catch me, I'll tell them
5 about the two murders, about murdering these two people. And
6 I'll even tell them about another murder I committed that they
7 have not charged me with. I'll tell them the truth about
8 everything, but you know what I'll lie to them about? I'll lie
9 about your involvement. And how about we point our finger at
10 cousin Joey, and I'll tell them it was him. And then Alain
11 here's what you do if you ever get arrested. What I want you
12 to do is tell the police that Joey confessed to you. And,
13 hopefully, they'll believe you. And, hopefully, we'll get
14 really lucky. And it will just so happen that the day the
15 police go looking for Joey, he'll come asking to talk to you.
16 So then we'll have Christian Guzman to corroborate all of that.
17 Is Guzman in on this, too?

18 The theory is absurd. There is no evidence that Alain
19 Darge was the shooter. When defense makes an argument like
20 that, you need to scrutinize it. If the shooter -- if Patrick
21 Darge were really trying to coverup the real shooter, why in
22 the world would he point at another family member.

23 Patrick Darge, like everyone you saw, was not happy
24 about testifying. Family members in the courtroom, testifying
25 against another family member. Patrick Darge told you about

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Summation - Mr. Richman

1 one person after another, after another; Gordo, Aladino,
2 Alberto Reyes, Tilo; a lot of other people he could have
3 pointed his fingers at. Why his cousin Joey? Because that's
4 who he did it, with.

5 Let me briefly touch on Yubel Mendez. Mr. Richman
6 doesn't want you to believe Yubel Mendez either. Remember how
7 Yubel Mendez told the government about the defendant. He
8 didn't know what the government was gonna ask him about. He
9 came in, he didn't know what the topic was. And at that
10 meeting, he told the government about the defendant. And what
11 he told the government about the defendant was spot on. He
12 told the government that the defendant admitted to him that he
13 was asked to do something with Patrick Darge and to bring a
14 weapon, and that's what he did.

15 Is it a coincidence that Yubel Mendez was just able to
16 come up with that on the spot and get it completely right? Of
17 course it's not.

18 Mr. Richmond made a point about the size of the gun
19 that Patrick Darge had, whether it was a .380. Darge said at
20 first he thought it was a .380. But he told you he is not a
21 gunsmith, he didn't know for sure what size gun it was. And
22 Detective Lacova also told you the bullets on .380 and
23 9-millimeter are pretty much identical; same diameter and
24 different slightly in length. That's another red herring.
25 Another red herring you heard was lack of DNA evidence. Not

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Summation - Mr. Richman

1 every crime has forensics evidence or DNA evidence, especially
2 not a crime that occurred 13 years ago. And you heard why it
3 wouldn't be in this case.

4 Patrick Darge and Joe Fernandez had their hoodies on.
5 They were wearing gloves, preventing leaving fingerprints.
6 There was no blood left on the scene. There would not have
7 been any DNA evidence. There is no reason to suspect there
8 would have been. But you did hear evidence, overwhelming
9 evidence, from Patrick Darge, from Yubel Mendez, and crime
10 scene evidence. That is more than enough.

11 You know, the defense wants it both ways with Patrick
12 Darge. On the one hand, they don't want you to believe him at
13 all. He's a liar, he's a liar, talking about Joe Fernandez.
14 And they don't want you to believe him at all. When Patrick
15 Darge took that witness stand and he told you about his crimes,
16 well, he was telling the truth then, right? When he told you
17 about the crimes, murders he committed, then he was telling the
18 truth. When he told you about what happened the day of the
19 murder, except when he got to the part about Joe Fernandez,
20 then he was telling the truth. But only when it was bad for
21 the defense, only then is Patrick Darge lying. They can't have
22 it both ways.

23 The defense went through a lot of inconsistencies,
24 supposed inconsistencies, in the testimony; stuff regarding
25 whether Patrick Darge shot the defendant upward or not, whether

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Summation - Mr. Richman

1 or not it makes sense they went to crime scene for the first
2 time the night before.

3 First of all, is there any question that Patrick Darge
4 committed these murders? I don't think there is. But to the
5 extent that there is slight inconsistency in the statements
6 from witnesses from a crime that occurred 13 years ago, that
7 shouldn't be surprising. This was an event that occurred a
8 long time ago. When you try to recall an event last week, let
9 alone 13 years ago, you are going to remember things slightly
10 different. That's the hallmark of the truth, that's proof the
11 witnesses didn't get together.

12 Now, let me close with this. Mr. Richman, you know,
13 readily admitted that he wants you have to sympathy for the
14 defendant. Working guy with a family. Family that loves him.
15 The government has no doubt, whatsoever, that the defendant's
16 family loves him. And ladies and gentlemen, Ildefonso
17 Vivero-Flores had a family, too. He had a fiance that he was
18 telling Alberto Reyes about the second before he was killed.
19 Fiance he never got to marry.

20 Albert Cuellar had a family. He had a daughter who
21 had to come up to New York City to the morgue to identify the
22 body. Your decision cannot be based on sympathy. This case is
23 too serious to base your decision on anything but the facts.

24 In fact, I think it's fair to say, every federal case
25 is a serious case, but not every case is a close case. This

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Summation - Mr. Richman

1 was not a close case. You heard overwhelming testimony,
2 testimony from the other shooter who identified the defendant,
3 physical evidence corroborated that, confessions that were made
4 to the Yubel Mendez and Alain Darge.

5 And if you do what I expect Judge Hellerstein will
6 instruct you to do in just about 30 seconds, if you consider
7 that evidence, and if you consider that evidence without bias
8 or sympathy, there is only one conclusion that you can reach
9 that is consistent with the evidence in this case, and that
10 conclusion is that the defendant is guilty beyond a reasonable
11 doubt.

12 THE COURT: Thank you, Mr. Cronan.

13 I'm going to take about an hour. Might be a good idea
14 to stand stretch in place, and then I'll start my instructions.

15 So put down your books, relax a bit. We'll go ahead.

16 If you want a break, it's okay. Do you want a little
17 break? Okay. Yeah? Well, why don't you all go out. Close
18 your books. Don't discuss the case. We'll wait here. When
19 you come back, I'll give you instructions.

20 (Jury excused)

21

22

23

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D350fer3

Summation - Mr. Richman

1 (In open court)

2 THE COURT: My next court exhibit, Mr. Cronan and Mr.
3 Richmond, I would like to be divided into A and B, court
4 exhibit six. A, the government showed the following exhibits
5 to the jury during it's closing; and then B will be the defense
6 do the same thing.

7 MR. RICHMAN: Very well, sir.

8 I only showed two exhibits, your Honor.

9 THE COURT: Okay. You have an easy job.

10 And that will be 6A and 6B. That's court exhibit 6A
11 and 6B will be what is shown to the jury.

12 (Recess)

13 THE DEPUTY CLERK: Ready?

14 THE COURT: Yes, bring in the jury.

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Summation - Mr. Richman

1 (In open court)

2 (Jury present)

3 THE COURT: Be seated, everybody. I would like to
4 begin by thanking you for your patience and alertness. You
5 have paid attention to all of the evidence throughout. I have
6 watched you. You saw what was going on. You watched each
7 witness. You watched all of the documents. I think you have
8 absorbed and taken into mind everything that has been said to
9 you. And that's not an easy task, so thank you for doing that.

10 And having done that, you are ready to decide the
11 case. You are ready to decide the case on the facts, and
12 according to the law that I delivered to you. And I'll deliver
13 this law in the context of this charge.

14 I have, first, to explain the rules and procedures
15 that apply to jury trials, generally. I then will explain the
16 rules of law applicable to the specific statutes that the
17 defendant is accused of violating. And then I'll give you
18 rules and procedures to help you evaluate the evidence. And,
19 finally, I'll tell you about procedures that you use during
20 deliberations.

21 As I have told you at the beginning, it is my job to
22 give you the law. That's the job of the judge. It's your job
23 to decide the facts according to the law. Please do not
24 consider whether I'm saying things in a correct way or an
25 incorrect way, or whether they make good sense to you, or not,

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Charge

1 as long as you understand what I'm saying.

2 But it's my job to give you the law. And it's your
3 job to accept the law as I give it to you, and then to apply it
4 to the facts. I will have no opinion on the facts. That's
5 your job. And yours alone. And in my judgment, and those of I
6 think all of my colleagues, there is nothing like a jury trial.

7 The jury rises to the highest level of intelligence of
8 any one of the jurors, applies the practical and common sense
9 that you bring to the courtroom, and almost always the verdicts
10 are just, reasonable, and proper. And that's the secret, one
11 of the secrets, of our democracy, the participation of ordinary
12 people from all walks of life, all degrees of intelligence,
13 come together and, in a democratic way, participate in the
14 delivery of a just verdict.

15 So you are the sole and exclusive judges of the facts.
16 That's your job, not mine. The evidence before you consists of
17 the answers given by witnesses, the testimony, that is, and the
18 exhibits that have been presented to you, and the stipulations
19 about what the lawyers agree to, or what the witnesses will
20 say.

21 Your verdict must be based solely upon the evidence
22 developed at trial, or the absence of evidence on any material
23 element. The defendant, Joe Fernandez, is entitled to a
24 presumption of innocence. That is to say he is presumed
25 innocent. It's the government's job to prove guilt. The

d350fer3

Charge

1 government must prove each and all of the elements of the
2 crimes charged, each beyond a reasonable doubt. The defendant
3 is not charged with proving his innocence. Another secret of
4 our democracy, that defendants are presumed innocent. It's the
5 government's burden to prove guilt. And if the government
6 fails to deliver on its burden, if it fails to prove each and
7 every element of each of the crimes charged beyond a reasonable
8 doubt, you cannot convict the defendant.

9 You may not consider any answer, testimony, or exhibit
10 that I directed you to disregard, or that I directed to be
11 stricken from the record. If an answer was stricken, it must
12 be entirely disregarded as though the words were never spoken.
13 If I granted an objection, don't speculate what you think the
14 witness my have said, that would be improper. It's only what
15 the witness says, responsive to the questions answered, and
16 what is contained in the exhibits, and what's contained in the
17 stipulations, that constitute evidence.

18 Now, it's a style in this Court that the government is
19 the party. The government brings a criminal case. But just
20 because it's the government bringing a criminal case, does not
21 give it any better entitlement to anyone else. Everyone is
22 equal in the court of law. The government no less than the
23 defendant, and no more than the defendant. They are equal.
24 Your job is to decide the government has proved each and all of
25 the elements beyond a reasonable doubt.

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Charge

1 The defendant begins trial presumed to be innocent of
2 the allegations against him. I instruct you that the defendant
3 is to be presumed by you to be innocent throughout the trial,
4 and throughout your deliberations, until such time, if ever,
5 that each of you is satisfied that the government has proven
6 every element of the charged crimes beyond a reasonable doubt.

7 This presumption of innocence, alone, is sufficient to
8 acquit the defendant, unless you as jurors are unanimously
9 convinced, beyond a reasonable doubt, of the defendant's guilt.
10 And you come to that view after a careful and impartial
11 consideration of all of the evidence in the case.

12 The defendant has pleaded not guilty, thus the
13 government has the burden to prove the charge against the
14 defendant beyond a reasonable doubt. The defendant begins this
15 trial with a clean slate. This burden remains with the
16 government throughout the entire trial, and never shifts to the
17 defendant. The law never imposes upon a defendant in a
18 criminal case the burden or duty of calling any witness, or
19 producing any evidence, or proving themselves innocent. Under
20 our Constitution, a defendant has no obligation to testify. It
21 is the government's burden to prove a defendant guilty beyond a
22 reasonable doubt. A defendant does not have to clear himself.

23 So I keep on using the phrase, "beyond a reasonable
24 doubt." What does it mean? What is a reasonable doubt?

25 The words almost define themselves. A reasonable

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Charge

1 doubt is a doubt based upon reason and common sense. It's a
2 doubt that a reasonable person has after carefully weighing all
3 of the evidence. It's a doubt that would cause a reasonable
4 person to hesitate to act in a matter of importance in his or
5 her personal life. Proof beyond a reasonable doubt must
6 therefore be proof of such a convincing character that a
7 reasonable person would not hesitate to rely and act upon it in
8 the most important of his or her own affairs.

9 However, the law does not require that the government
10 prove guilt beyond all possible doubt. A reasonable doubt is
11 not a caprice or whim. It's not a speculation or suspicion.
12 It's not an excuse to avoid the performance of an unpleasant
13 duty. It's not sympathy. It's the government's burden to
14 prove each of the elements of the crimes charged beyond a
15 reasonable doubt.

16 The defendant does not have to present evidence or to
17 challenge the evidence presented by the government. Nor do you
18 have to accept the testimony of any witness even one who has
19 not been contradicted or impeached, if you find that witness
20 not to be credible.

21 You must decide which witnesses to believe and which
22 testimony is true. And to what extent. To do this, you must
23 look at all of the evidence drawing upon your own common sense
24 and experience. If after fair and impartial consideration of
25 all of the evidence, or the lack of evidence on any particular

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Charge

1 point, you have a reasonable doubt as to the guilt of the
2 defendant, it is your duty to acquit.

3 On the other hand, if after fair and impartial
4 consideration of all of the evidence, you are satisfied of the
5 guilt of the defendant beyond a reasonable doubt of the crime
6 charged against that defendant, then you should vote to
7 convict.

8 As I said at the beginning, the way the government
9 presents the crimes charged is by an indictment. An indictment
10 is not evidence. It's a formal way to bring the charges
11 against you for the government to prove, and for you to decide.
12 The indictment must be given no evidentiary value. It is only
13 an accusation. No weight or significance, whatever, is to be
14 given to the fact that an indictment has been brought against
15 the defendant.

16 The defendant has denied the charges contained in the
17 indictment. That sets up the trial, that sets up the
18 requirement for the government to prove the case beyond a
19 reasonable doubt as to which defendant enjoys a presumption of
20 innocence. And, ultimately, for you to evaluate the evidence
21 and to decide if the government has indeed satisfied its burden
22 to prove each and all of the elements of the crimes charged
23 beyond a reasonable doubt.

24 So, we start with the indictment. These are the
25 accusations. These are the allegations. There are two counts:

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Charge

1 One, on or about February 22, 2000, in the Southern
2 District of New York and elsewhere --

3 The Southern District of New York is the geographical
4 boundaries of this Court; Manhattan, the Bronx, Westchester and
5 various other counties to the north and the west.

6 So on or about February 22nd, 2000 in the Southern
7 District of New York and elsewhere, Joe Fernandez, the
8 defendant, and others known and unknown, willfully and
9 knowingly did combine, conspire, confederate and agree together
10 and with each other, to travel in and cause another to travel
11 in interstate and foreign commerce, and to use and cause
12 another to use the mail and any facility of interstate and
13 foreign commerce with intent that a murder be committed in
14 violation of the laws of any state in the United States, as
15 consideration for the receipt of, and as consideration for a
16 promise and agreement to pay anything of pecuniary value, to
17 wit, Fernandez agreed with others to kill two persons later
18 identified as Ildefonso Vivero-Flores and Arturo Cuellar, in
19 exchange for currency and other things of pecuniary value. And
20 in the course thereof, the conspirators did communicate through
21 a facility of interstate commerce which resulted in the murder
22 of Flores and Cuellar in the vicinity of 3235 Parkside Place,
23 Bronx, New York. Bronx, New York, is in the Southern District
24 of New York.

25 (Continued on next page)

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Charge

1 THE COURT: Count Two.

2 On or about February 22, 2000, in the Southern
3 District of New York, Joe Fernandez, the defendant, willfully
4 and knowingly, during and in relation to a crime of violence
5 for which he may be prosecuted in a court of the United States,
6 namely, a conspiracy to commit murder for hire, did use and
7 carry a firearm; and, in furtherance of such crime, did possess
8 a firearm, and did aid and abet the use, carrying, and
9 possession of a firearm; and, in the course of that crime, did
10 cause the death of two people through the use of a firearm,
11 which killing is murder as defined in Title 18, United States
12 Code, Section 1111(a). To wit, Fernandez caused the death of
13 Ildefonso Flores and Arturo Cuellar by discharging a firearm at
14 Flores and Cuellar, and aiding and abetting the discharge of a
15 firearm in the vicinity of 3235 Parkside Place, Bronx, New
16 York.

17 Those are the accusations.

18 And in the balance of the charge, I will break down
19 those accusations and the elements that you need to understand
20 and which the government has its burden to satisfy by proving
21 each and all beyond a reasonable doubt.

22 I'll start with the summary. And I'll tell you at the
23 end you decide each count separately. There's a verdict sheet
24 that I will explain to you that will help you in your
25 deliberations. And you go throughout and you use it -- sorry.

D35VFER4

Charge

1 Stumbling. And you'll use it to help you evaluate the
2 evidence. And if you come to a conclusion, to come to a
3 conclusion and note it on this verdict sheet, and I'll tell you
4 about that later.

5 Let me start with a summary.

6 Count One of the indictment charges that the
7 defendant, Joe Fernandez, unlawfully, willfully, and knowingly
8 conspired with others, known and unknown, to use and cause
9 others to use a facility in interstate and foreign commerce
10 with the intent to commit the murders of Arturo Cuellar
11 Dejerena, and Ildefonso Flores Vivero, in violation of the laws
12 of the state of New York as consideration for a promise to pay
13 a sum of money. This conspiracy is alleged to have taken place
14 on or about the date of the alleged murders that is February
15 22, 2000.

16 The government contends that the defendant joined and
17 was a member of the alleged conspiracy. The defendant denies
18 that he was a member of the alleged conspiracy, and denies that
19 he intended to join a conspiracy to use or cause others to use
20 a facility in interstate commerce with the intent that murder
21 be committed as consideration for a promise to pay money.

22 The crime of conspiracy to commit a murder for hire is
23 an independent offense; it is separate and distinct from the
24 actual commission of a murder for hire, which the law refers to
25 as a substantive crime. You may find the defendant guilty of a

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1 crime of conspiracy to commit a murder for hire even if the
2 substantive crime that was the object or the conspiracy was not
3 actually committed. Conspiracy standing alone is a separate
4 crime, even if a conspiracy is not successful.

5 I will now go on to define the elements of the crime
6 of conspiracy charged in the indictment.

7 The government has to prove beyond a reasonable doubt
8 the following elements:

9 First, that the conspiracy charged in Count One of the
10 indictment existed; that is, that there was an agreement or
11 understanding among two or more persons to violate those
12 provisions of the law that make it illegal to use or cause
13 others to use a facility in interstate and foreign commerce
14 with the intent that murder be committed as consideration for a
15 promise to pay money.

16 And second, that the defendant, Joe Fernandez,
17 unlawfully, intentionally, and knowingly, became a member of
18 the conspiracy.

19 So the first element of Count One is a charge that a
20 conspiracy to commit a murder for hire existed.

21 A conspiracy is an agreement by two or more persons to
22 violate the law. The government is not required to show that
23 two or more people sat around a table and entered into a formal
24 contract in order to establish the existence of a conspiracy.
25 It's sufficient if two or more persons in any manner, whether

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1 they said so directly or not, came to a common understanding to
2 violate the law. There's no magic language or specific words
3 that is required. Did two or more people come to an agreement
4 or understanding to violate the law. If, upon consideration of
5 all the evidence, direct and circumstantial, you find beyond a
6 reasonable doubt that the minds of two or more of the
7 conspirators met, that is, that they agreed to work together to
8 further the unlawful scheme alleged in the indictment, then
9 proof of the existence of the conspiracy is established.

10 In order to find that a murder-for-hire conspiracy
11 existed, you must also find that the conspiracy was intended to
12 achieve the unlawful purpose charged in the indictment; that
13 is, that the object of the conspiracy was to use or cause
14 others to use a facility in interstate or foreign commerce with
15 the intent that murder be committed in consideration for a
16 promise to provide something of pecuniary value.

17 The requirement regarding the object of a conspiracy
18 itself requires the government to prove three points, each
19 beyond a reasonable doubt:

20 First, that one or more of the conspirators either
21 traveled in interstate or foreign commerce or used or caused
22 another to use a facility in interstate or foreign commerce. A
23 telephone, for example, is such a facility in interstate
24 commerce.

25 Second requirement: That the travel or use of the

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1 facility in interstate commerce was undertaken with the intent
2 that a murder be committed, in violation of the laws of any
3 state of the United States.

4 And third, that the murder was intended to be
5 committed in consideration for receiving something of pecuniary
6 value.

7 So let me double-back and go over these points.

8 The government first must prove that the object of the
9 conspiracy is that one of the conspirators, at least one,
10 traveled in interstate or foreign commerce or used a facility
11 of interstate or foreign commerce with the intent that a murder
12 for hire take place. The government need prove only that a
13 conspirator either traveled in interstate or foreign commerce,
14 or used a facility of interstate or foreign commerce; it need
15 not prove both.

16 The crossing of a state or international border
17 constitutes traveling in interstate or foreign commerce. A
18 facility of interstate or foreign commerce is any means of
19 transportation or communication that causes state or
20 international lines in the course of commerce. This includes
21 the mail or telephone that is capable of making phone calls
22 across state lines or internationally, or the interstate
23 highway system. The actual use of the interstate or foreign
24 facility need not have actually crossed state or foreign lines.

25 For example, if you find that one of the conspirators

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1 or more used a telephone that was capable of making
2 out-of-state calls as part of the murder-for-hire conspiracy,
3 that's sufficient. Or if you find that the government
4 proved -- and each of these must be the subject of proof by the
5 government beyond a reasonable doubt with inferences and
6 everything else that you use to analyze the evidence. Or if
7 one of the conspirators traveled on an interstate highway as
8 part of the conspiracy, either the use of the telephone or use
9 of the mails or the use of an interstate highway can qualify as
10 a use of an interstate facility, even if the particular drive
11 was entirely within a state or the particular use of the phone
12 call was in a particular state. So it's the capability that is
13 the key on this point.

14 Next, the travel across interstate or foreign lines or
15 the use of a facility in interstate or foreign commerce must
16 have been undertaken with intent that a murder be committed, in
17 violation of the laws of the state. The intention that murder
18 be committed need not have been the only reason or even a
19 principal reason for the use of the interstate facility, as
20 long as it was one of the reasons for the use of the interstate
21 facility.

22 Under the laws of New York State, murder is committed
23 by an unlawful killing of another person purposely or
24 knowingly. A person kills purposely when his conscious object
25 is to cause the death of another person. A person kills

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1 knowingly when he is aware that what he is doing will cause the
2 death or it's practically certain to cause the death of
3 another. The government does not have to prove that a murder
4 was actually committed or even that it was actually attempted;
5 it must prove that the facility in interstate commerce was used
6 with the intention to further or facilitate the commission of a
7 murder that was intended.

8 Next, the murder must have been intended as
9 consideration or in consideration for the receipt of anything
10 of value: An exchange of a promise to commit a murder for a
11 promise or the actual receipt of something of value. That
12 means that there was a mutual agreement or understanding or
13 promise that something of value would be paid or exchanged for
14 committing the murder. Items of pecuniary value include money,
15 but are not limited to money. It could include other things of
16 value, like jewelry or real estate or whatever has monetary
17 value.

18 So to summarize, the first element of Count One is
19 that there was an agreement or understanding among two or more
20 persons to violate those provisions of the law that make it
21 illegal to use or cause another to use a facility in interstate
22 commerce with the intent that murder be committed, in violation
23 of the law of New York State, in consideration for a promise to
24 pay money or something of pecuniary value. The government must
25 prove this element beyond a reasonable doubt in order for you

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1 to be able to find the defendant guilty of Count One.

2 The next element is to ask if the defendant joined or
3 became a member of the conspiracy unlawfully, willfully, and
4 knowingly. That is, did the defendant, Joe Fernandez,
5 participate in the conspiracy with knowledge of its unlawful
6 purpose, and with a specific intention of furthering its
7 objectives.

8 Knowledge is a matter of inference from facts proved.
9 One cannot enter another person's mind. To have guilty
10 knowledge, the defendant need not know the full extent of the
11 conspiracy, nor does he have to know all the activities of the
12 conspiracy, or even all the members of the conspiracy. A
13 conspirator's liability is not measured by the extent or
14 duration of his participation. Indeed, each member may perform
15 separate and distinct acts, and may perform them at different
16 times. Some conspirators may play major roles, other minor
17 roles. Sometimes a single act may be enough to bring a
18 defendant within the membership of the conspiracy, providing
19 that the defendant was aware of the conspiracy and knowingly
20 associate himself with its criminal aims. This aspect of
21 knowing association, being aware of a conspiracy and knowingly
22 participating in it, is the issue. The government must prove
23 such knowing participation beyond a reasonable doubt before you
24 can find a defendant guilty of being a member of the
25 conspiracy.

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1 However, mere association with one or more members of
2 a conspiracy or even helping another member of a conspiracy
3 does not automatically make a defendant a member; likewise,
4 mere knowledge or acquiescence without intentional and knowing
5 participation in an unlawful plan is not sufficient. What is
6 necessary is that a defendant aid or participate in a
7 conspiracy with knowledge of at least one of its unlawful
8 purposes, and with intent to help accomplish that purpose.
9 It's not necessary that a defendant receive or even anticipate
10 any financial benefit from his participation in a conspiracy,
11 as long as he knowingly aided or participated in it with the
12 intention to help the conspirators achieve their unlawful
13 purpose.

14 The government must prove beyond a reasonable doubt
15 that defendant Joe Fernandez knew of the conspiracy to use or
16 cause others to use a facility in interstate commerce with the
17 intent that murder be committed, in violation of the laws of
18 New York State, in consideration for a promise to pay money,
19 the defendant knew the conspiracy's unlawful purpose, and that
20 defendant joined in it to further its unlawful objectives.

21 I will now define for you some of the terms that I
22 have used.

23 First the term "unlawfully." "Unlawfully" means
24 contrary to law; that is, to do something which the law
25 forbids. It's not necessary that a defendant know that he was

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1 violating any particular law. You must be convinced beyond a
2 reasonable doubt that defendant was aware that what he was
3 doing was in some way unlawful.

4 Then the term "knowingly." A person acts knowingly if
5 he acts purposely and deliberately, and not because of mistake
6 or accident, mere negligence, or other innocent reason. His
7 acts must be the product of conscious intention, and not
8 because he was careless, negligent, or foolish.

9 And then I use the term "willful." Willfulness, like
10 knowledge, exists in the mind. In considering if willfulness
11 has been proved, you may consider that a person ordinarily
12 intends the natural and probable consequences of an act
13 knowingly done. If it's unlawful, if he knows about it, and he
14 has an evil purpose, he's acting willfully.

15 In this context, a person cannot intentionally close
16 his eyes to the obvious. Pretending to disregard what he knows
17 and sees and not to know what he plainly sees before him, for
18 you may infer from the willful and deliberate avoidance of
19 knowledge that the defendant actually had knowledge. Thus, if
20 you find that a defendant knew that there was a high
21 probability that he was using or causing others to use a
22 facility in interstate commerce with the intent that murder be
23 committed, in violation of New York State law, and in
24 consideration for a payment of money, but willfully and
25 deliberately disregarded those facts, you may infer from such

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1 willful and deliberate avoidance of knowledge that defendant
2 actually had knowledge, that he was, in fact, using or causing
3 others to use a facility in interstate commerce with the intent
4 that murder be committed, in violation of New York law, in
5 consideration for a promise to pay money.

6 If, however, the defendant believed that he was not
7 involved with others in the conspiracy to use or cause others
8 to use a facility in interstate commerce with the intent that's
9 required, and in consideration for the pecuniary promise, or if
10 he was merely negligent or careless with regard to what
11 knowledge he had, he lacks the requisite state of knowledge to
12 have become a conspirator. One cannot become a member of a
13 conspiracy unless he did so knowingly, willfully, and
14 unlawfully. And the government must prove that beyond a
15 reasonable doubt.

16 Only if the government proves beyond a reasonable
17 doubt that a conspiracy existed, and that the defendant became
18 a member of the conspiracy, may the government prove the
19 defendant acted with knowledge of the illegal objective by
20 showing that he deliberately closed his eyes. You must judge
21 from all of the circumstances and all of the evidence if the
22 government did or did not satisfy its burden of proof beyond a
23 reasonable doubt as to the defendant's state of knowledge and
24 as to his joining the conspiracy.

25 The indictment charges that the conspiracy existed on

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1 or about February 22, 2000. The law requires only a
2 substantial similarity between the dates alleged in the
3 indictment and the dates established by the evidence. It's
4 sufficient if you find beyond a reasonable doubt that defendant
5 became a member of the conspiracy charged in the indictment
6 during some time around the charge date of February 22, 2000.

7 If you find that the government satisfied the elements
8 in the crime by proving each of the elements beyond a
9 reasonable doubt, and if you find that there was a conspiracy
10 to commit a murder for hire, and that defendant joined it, and
11 all the aspects of using the facility of interstate commerce as
12 to which I charged you, you reached another question, and that
13 is, did death result from the murder-for-hire conspiracy.

14 You must ask yourselves if the murder-for-hire
15 conspiracy actually resulted in the death of one or more
16 persons. This death could have been caused by any member of
17 the conspiracy and not necessarily the act of the defendant
18 himself. As long as it was by a member of the conspiracy, you
19 need not find that it was the defendant himself who committed
20 the murders in order to find that death resulted from the
21 conspiracy. You do not address this question if you find not
22 guilty to the crime charged in Count One; you answer the
23 question only if you find the defendant guilty.

24 So there's a one-page verdict sheet that we'll give to
25 the foreperson. And it asks this question: How do you find

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1 Joe Fernandez with respect to Count One, conspiracy to commit
2 murder for hire. There's two blanks: Guilty and not guilty.
3 If you're unanimous, depending on whether you have him as for
4 guilty or for not guilty, the foreperson will check the
5 appropriate box. So if you unanimously find that the
6 government proved beyond a reasonable doubt each and all of the
7 elements of Count One, the foreperson, after the vote, checks
8 "guilty." If you find unanimously that the government failed
9 to satisfy its burden to prove each and all of the elements
10 beyond a reasonable doubt, and you so vote; the foreman checks
11 "not guilty."

12 If you found guilty for the first question, you'll go
13 on to Question 2: Did the conspiracy to commit murder for hire
14 result in the death of either or both Ildefonso Vivero-Flores
15 or Arturo Cuellar. Again, if you unanimously vote yes, the
16 foreperson checks "yes." If you unanimously vote no, the
17 foreperson checks "no."

18 Now I'll go on to Question 3.

19 But you'll notice that I said "unanimously votes" to
20 either question. Whether it's guilty or not guilty, your vote
21 has to be unanimous. A verdict that is not unanimous is not a
22 verdict. A verdict must be unanimous of all the jurors.

23 I'm going to go on now to Count Two.

24 Is there any question? Do you want me to repeat
25 anything?

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1 You're okay. All right.

2 Count Two alleges that defendant violated -- this is a
3 little complicated, so I'm going to go through it slowly --
4 violated Section 924(j) of the federal criminal code, 18 U.S.
5 Code, Section 924(j). Section 924(j) incorporates another
6 section of the code, Section 924(c), which makes it a crime for
7 any person during and in relation to any crime of violence to
8 use or carry a firearm, or in furtherance of any such crime, to
9 possess a firearm. And, if so, Section 924(j) makes it a crime
10 for any person in the course of a violation of 924(c) to cause
11 the death of a person through the use of the firearm.

12 It might be helpful if I read the charge again, and
13 then go in and define all the elements for you.

14 On or about February 22, 2000 -- this is Count Two --
15 in the Southern District of New York, Joe Fernandez, the
16 defendant, willfully and knowingly, during and in relation to a
17 crime of violence, for which he may be prosecuted in a court of
18 the United States, namely, a conspiracy to commit murder for
19 hire, did use and carry a firearm. And, in furtherance of such
20 crime, did possess a firearm, and did aid and abet the use,
21 carrying and possession of a firearm. And in the course of
22 that crime, did cause the death of two people through the use
23 of a firearm, which killing is murder as defined by federal
24 law. To wit, Fernandez caused the death of Ildefonso
25 Vivero-Flores and Arturo Cuellar by discharging a firearm at

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1 Flores and Cuellar, and aiding and abetting the discharge of a
2 firearm in the vicinity of 3235 Parkside Place, Bronx, New
3 York.

4 To convict the defendant of Count Two, the government
5 must prove each of the following elements, each beyond a
6 reasonable doubt:

7 First, that on or about the date alleged in the
8 indictment, February 22, 2000, the defendant used, carried, or
9 possessed a firearm; second, that the defendant used or carried
10 the firearm during and in relation to a crime of violence, or
11 possessed a firearm in furtherance of such crime; third, that
12 defendant caused the death of a person through the use of a
13 firearm; fourth, that the death of that person qualifies as a
14 murder, defined by federal law; and, fifth, that the defendant
15 acted knowingly, unlawfully, and willfully. The government
16 must prove each and all these five elements, each beyond a
17 reasonable doubt.

18 So, again, I will double-back and define everything
19 for you.

20 A firearm means any weapon which will or is designed
21 to or may readily be converted to expel a projectile by the
22 action of an explosive. In considering the specific element of
23 whether the defendant used or carried or possessed a firearm,
24 it does not matter if the firearm was loaded or operable at the
25 time of the crime. A gun is a firearm.

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1 What is use of a firearm?

2 In order to prove that the defendant used a firearm,
3 the government must prove beyond a reasonable doubt an active
4 employment of a firearm by the defendant during and in relation
5 to the commission of the crime of violence. This does not mean
6 that defendant must actually fire or attempt to fire the
7 weapon, although those would obviously constitute a use of the
8 weapon.

9 Brandishing, displaying, or referring to a weapon so
10 that other persons know that defendant had a firearm available,
11 if needed, all constitute use of a firearm. The mere
12 possession of a firearm at or near the site of a crime without
13 active employment, however, is not sufficient. So one must use
14 the firearm in connection with a crime of violence.

15 Or -- and this is the next definition -- carry a
16 firearm. In order to prove that the defendant carried a
17 firearm, the government must prove beyond a reasonable doubt
18 that defendant had the firearm on his possession while he moved
19 from one place to another, having a degree of possession over
20 the firearm while he moved it. He was then carrying the
21 firearm with his movement.

22 In order to carry a firearm, the defendant need not
23 have carried the firearm on his very person. A defendant can
24 also carry a firearm if he conveys it in some vehicle which he
25 controls or there's another way of having the firearm moved so

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1 that as he moves, he has it available for use.

2 Possession of a firearm means having custody or
3 control over the firearm. The legal concept of possession may
4 differ from the everyday use of the term. Actual possession is
5 what most of us think of as possession; that is, having
6 physical custody or control of an object. A person, however,
7 need not have actual physical possession in order to be in
8 legal possession of it. If he has the ability to exercise
9 substantial control over an object, even if he does not have
10 the object in his physical custody, and the person has the
11 intent to exercise control, then he's considered to have
12 possession of the article. That term is a constructive
13 possession.

14 Control over an object may be demonstrated by the
15 existence of a working relationship between one person having
16 the power or ability to control an item, and another person who
17 has actual, physical custody. In addition, an individual may
18 have possession of an item that is not found on his person
19 because that individual has a relationship to the location
20 where the item is maintained. More than one person can have
21 control over the same firearm. Since possession may be sole or
22 joint, if one person alone has actual or constructive
23 possession, possession is sole. If more than one person has
24 possession of it, then possession can be joint.

25 Possession cannot be found solely on the ground that

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1 defendant was near a gun. However, you may consider this
2 proximity in connection with all other evidence in making your
3 decision as to whether the defendant possessed a firearm.

4 Possession of a firearm in furtherance of a crime of
5 violence requires that the defendant possess a firearm, and
6 that the possession advance or move the crime forward. Mere
7 presence of a firearm is not enough. Possession in furtherance
8 of a crime of violence requires that the possession be incident
9 to and an essential part of the crime. The firearm must have
10 played some part in furthering the crime in order for this
11 element to be satisfied.

12 Next the government must prove beyond a reasonable
13 doubt that the defendant used or carried a firearm during and
14 in relation to a crime of violence or possessed a firearm in
15 furtherance of a crime of violence. Possession in furtherance
16 of a crime of violence requires that the possession be incident
17 to and an essential part of the crime; that the firearm must
18 have played some part in furthering the crime in order for the
19 element to be satisfied. You must find from the government's
20 proof beyond a reasonable doubt that the defendant participated
21 in the crime of violence described in the indictment. If you
22 find that the government proved the crime of violence beyond a
23 reasonable doubt, here the crime of violence is to kill Flores
24 or Cuellar, either of them, that constitutes a murder for hire
25 as I've instructed you.

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1 So the question is did the defendant use or carry or
2 possess in furtherance of the crime a weapon that is a gun.

3 The third element the government must prove beyond a
4 reasonable doubt is that defendant caused the death of another
5 person through the use of a firearm.

6 A defendant's conduct may be found to cause the death
7 of another individual if it had such an effect in producing
8 that individual's death that to lead a reasonable person to
9 regard the defendant's conduct as the cause of death. The
10 death of a person may have one or more than one cause. The
11 government need only prove that the conduct of the defendant
12 was a substantial factor in causing the victim's death. You
13 need not find that the defendant himself shot the victim or
14 that he committed the final fatal act, as long as his conduct
15 was a substantial factor in causing the death of a victim.

16 The fourth element that the government must prove
17 beyond a reasonable doubt is that the death of a person
18 qualifies as a murder. You remember I defined murder according
19 to New York State law. The federal law is somewhat different,
20 at least in terminology.

21 Under federal law, murder is the unlawful killing of a
22 human being, with malice of forethought. Every murder
23 perpetrated by poison, lying-in-wait, or any kind of willful,
24 deliberate, malicious, and premeditated killing, or committed
25 in the perpetration of or attempted to perpetrate certain

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1 crimes, including robbery, qualifies as murder.

2 So the unlawful killing -- and I've explained
3 "unlawful" before -- of a human being with malice of
4 forethought -- which means some kind of planning, intending to
5 do the planning to facilitate the commission of a murder, of a
6 killing -- constitutes federal definition of murder.

7 And it must be done, as I said before, using or
8 carrying or possessing a firearm in furtherance of that crime,
9 and acting knowingly and willfully in doing so. The government
10 must prove beyond a reasonable doubt that defendant had
11 knowledge that what he was carrying or using was a firearm, and
12 that he was using the firearm or carrying it or possessing it
13 to facilitate the crime of violence of killing one or two of
14 Flores or Cuellar.

15 I've already defined the terms "knowingly" and
16 "willfully" in those definitions, and I won't repeat them,
17 unless one of you wants me to.

18 Defendant can be found guilty of this crime either if
19 he does something himself or he aids or abets another. Aiding
20 and abetting liability is a theory of criminal liability. It
21 permits a defendant to be convicted of a specific crime if the
22 defendant, while not himself committing the crime, aids and
23 abets and assists another person or persons in committing that
24 crime. Whoever aids, abets, counsels, commands, induces, or
25 procures the commission of offense is punishable as a

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1 principal; that is, punishable as if he did it himself. It's
2 not necessary for the government to show that the defendant
3 physically committed the crime himself in order for you to find
4 a defendant guilty. If you do not find beyond a reasonable
5 doubt that that defendant physically committed a crime, you
6 may, under certain circumstances, still find him guilty if he
7 was an aider and abettor of another who committed the crime. A
8 person who aids and abets another to commit an offense is just
9 as guilty for that offense as if he personally had committed it
10 himself. You may find the defendant guilty if you find beyond
11 a reasonable doubt that the government proved that another
12 person actually committed the crime, and that the defendant
13 aided and abetted that person in committing that offense.

14 So if another person committed the crime, and if the
15 defendant aided and abetted another, that is, knowingly
16 associate himself in some way with that crime and willfully
17 associated himself in that way, that person can be an aider and
18 abettor.

19 Participation in the crime is willful if the action is
20 taken voluntarily and intentionally, with a specific intent to
21 help that crime along, with a bad purpose to disobey or to
22 disregard the law. Mere presence at the scene of a crime is
23 not enough. Even coupled with knowledge by the defendant that
24 a crime is being committed, or morally acquiescing in the
25 commission of a criminal act by another, there must be an

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1 actual aiding and abetting, an actual assistance to further the
2 crime, adopting it as if it were his own. You ask yourself,
3 did the defendant participate in the crime charged as something
4 he wished to bring about or associate himself with, a criminal
5 venture, knowingly and willfully, or seek by his actions to
6 make the criminal venture succeed. If he did those things, you
7 can find the defendant guilty as an aider and abettor just the
8 same way as if he did it himself.

9 Now, the act alleged in Counts One and Two are to have
10 alleged to have occurred in the Southern District of New York,
11 which includes Manhattan, the Bronx, and Westchester County.
12 The conspirators need not all have been present in the Southern
13 District of New York, as long as an act in furtherance of the
14 conspiracy occurred there. And that issue is found
15 sufficiently by a preponderance of the evidence, but it's not
16 under any doubt that the crime was -- if it was committed, was
17 committed in the Bronx. And that's in the Southern District of
18 New York. So venue really is not an issue.

19 So I've now completed the definitions of the crime
20 charged. Let me return to the verdict sheet and familiarize
21 yourselves with Question 3.

22 Question 3 deals with Count Two. And it asks: How do
23 you find Joe Fernandez with respect to Count Two, murder
24 through use of a firearm? Again, it asks guilty or not guilty.
25 And the foreperson, after the vote -- it must be unanimous --

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1 will check the appropriate box, guilty or not guilty.

2 That will complete the verdict sheet. The foreperson
3 will date it, sign it, and I'll tell you how to use it in a few
4 minutes.

5 Now I've gone through some of the basic requirements,
6 presumption of innocence, burden to prove beyond a reasonable
7 doubt, and defined the elements of the crime. I now want to
8 talk to you about the evidence and how to deal with the
9 evidence, since your verdict must be based upon the evidence or
10 lack of evidence in the case.

11 As I said at the outset, there are two basic
12 categories of evidence: Direct proof and circumstantial proof.
13 Each has its own values. Each can be its own factor of
14 weakness or strength, and that's for you to evaluate it.

15 Evidence is direct when the facts are shown by
16 exhibits that are admitted into evidence or whether testimony
17 is sworn to by witnesses who have actual knowledge of facts by
18 something they have derived by the exercise of their senses
19 such as something they heard, something they saw, something
20 they smelled, something they touched, and so on.

21 Circumstantial evidence is evidence that tends to
22 prove a disputed fact by proof of other facts. You infer on
23 the basis of reason and experience and common sense from an
24 established fact the existence or the nonexistence of some
25 other fact.

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1 Circumstantial evidence is of no less value than
2 direct evidence. As a general rule, the law makes no
3 distinction between direct and circumstantial evidence, but
4 simply requires that before convicting a defendant, the jury
5 must be satisfied of that defendant's guilt beyond a reasonable
6 doubt from all the evidence in the case or the lack of evidence
7 on any material element.

8 One form of evidence is a stipulation. It's an
9 agreement of the parties that a witness would say such a thing
10 or that a document says such a thing, or that such a thing
11 exists. You accept that just the same as any other element of
12 evidence, giving it whatever importance you think it deserves.

13 Any of you need a stretch a bit before I go on?

14 Another 15 minutes.

15 Keep going. Okay.

16 I've talked about inferences, and the lawyers have
17 used the phrase "inference." An inference is not a suspicion
18 or guess; it's a reasoned, logical decision to conclude that a
19 disputed fact exists on the basis of another fact that you know
20 exists. There are times when different inferences may be drawn
21 from facts, whether proved by direct or circumstantial
22 evidence. The government may ask you to draw one set of
23 inferences, while the defense may ask you to draw another.
24 It's for you and you alone to decide what inferences you will
25 draw and what strength you will give them.

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Charge

1 An inference is a deduction or conclusion which you,
2 the jury, are permitted -- but not required -- to draw from the
3 facts that have been established by other direct or
4 circumstantial evidence. In drawing inferences, you exercise
5 your common sense. So while you're considering the evidence
6 presented to you, you're permitted to draw from the facts which
7 you find to be proven such reasonable inferences as would be
8 justified in light of your experience.

9 Again, let me remind you that whether based upon
10 direct or circumstantial evidence, whereupon the logical,
11 reasonable inferences drawn from such evidence, you must be
12 satisfied of the guilt of the defendant beyond a reasonable
13 doubt before you may convict him.

14 The credibility of witnesses, of course, is one of the
15 major things that you have to deal with in evaluating the
16 evidence. I'm sure that it's clear to you by now that you are
17 being called upon to resolve sharply-disputed factual issues.
18 You have to decide whether or not the government has proved
19 guilt beyond a reasonable doubt by judging the credibility of
20 the witnesses that it has presented to you.

21 You've listened to the witnesses; you've observed
22 them. You need to make judgments carefully, scrutinizing all
23 the testimony that each witness gave in relation to the
24 testimony and exhibits that other witnesses and other documents
25 made before you. You look at the circumstances under which

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Charge

1 each witness testified, and any other item in evidence which
2 may help you to decide how true the witness's testimony is, how
3 important it is, what credibility to give to that witness.

4 There's no magic formula to evaluate testimony. You
5 bring to this courtroom all the experience and the background
6 of your lives and your everyday affairs. You determine for
7 yourself every day and in a multitude of circumstances the
8 reliability of statements which are made to you by others. The
9 same tests that you use in your everyday life on matters of
10 importance are the tests you use in your deliberations.

11 Your decision whether or not to believe a witness may
12 depend on how that witness impressed you. Did the witness have
13 the capacity to see, hear, and remember? Was the witness
14 frank, candid, and forthright? Did the witness seem like he
15 was hiding something, being evasive, or suspect in some way?
16 How did the way in which the witness testified on direct
17 examination compare with the way in which the witness testified
18 on cross-examination? Was the witness's testimony consistent
19 or contradictory? Did the witness appear to know what he was
20 talking about? Did the witness strike you as someone who was
21 trying to report his knowledge accurately?

22 How much you choose to believe a witness may be
23 influenced by the witness's bias. Did the witness have a
24 relationship with the government that may affect how that
25 witness testified? Did the witness have an interest in the

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Charge

1 outcome of the case, some incentive, loyalty, or motive that
2 might cause a witness to shave the truth? Did the witness have
3 some bias, prejudice, or hostility that might have caused the
4 witness consciously or not to give you something other than a
5 completely accurate account of the facts that the witness
6 testified about?

7 If a witness has an interest in the outcome, that
8 witness is not necessarily incapable of giving truthful
9 testimony. It's for you to decide to what extent, if at all,
10 the witness's interest has affected or colored his testimony.
11 But evidence that one witness is bias, prejudiced, or hostile
12 with respect to someone else requires you to view that
13 witness's testimony with caution, to weigh the evidence with
14 care, and subject it to careful consideration. Again, only
15 you, the jury, could decide how to weigh testimony. Ask
16 yourselves if the witness's recollection of the facts stands up
17 in light of all the other evidence in the case.

18 If you find that a witness has willfully testified
19 falsely as to one material fact, you have the right to reject
20 the testimony of that witness in its entirety. On the other
21 hand, even if you find that a witness has testified falsely or
22 inaccurately about one matter, you may reject as false or
23 inaccurate that portion of the testimony, and accept as true
24 any other portion of the testimony that recommends itself to
25 your belief, or which you may find or corroborative by other

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Charge

1 evidence in the case.

2 In determining the credibility of witnesses, you may
3 consider the fact that some witnesses have discussed the facts
4 of the case and their testimony with lawyers before appearing
5 in court. That's not an unusual practice. Lawyers prepare
6 witnesses to familiarize the witnesses with all of the details
7 so that the witness come in more efficiently and intelligently,
8 but it's something to keep in mind. You make the decision. If
9 the witness appears to have rehearsed testimony to satisfy
10 another, or if the witness is reporting information accurately,
11 credibly, honestly, preparation can serve good purposes, and
12 witnesses can have different kinds of motives in being
13 prepared. You, the jury, with your common sense and
14 experience, decide what weight to give to the preparation, and
15 to decide if it has affected negatively or positively the
16 witness's ability to tell you the truth consistently without
17 the other evidence in this case.

18 In all of these things, you try to decide credibility
19 by sizing up people in light of their demeanor and the way they
20 testify, the explanations they gave, what the other evidence in
21 the case says, whether things are consistent or inconsistent,
22 and so on, the same way you do on other matters that are
23 important in your life. You do not leave your common sense and
24 experience behind you. They are what you bring to judge the
25 credibility of the witnesses before you, and, indeed, in

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Charge

1 evaluating all the evidence in the case.

2 Now, we've heard testimony from cooperating witnesses,
3 and the lawyers have argued about this in their summations.

4 A cooperating witness is one who has made an agreement
5 with the government to cooperate with the government in giving
6 information, and presumably in telling the truth about such
7 information. And you've heard about clauses in the cooperating
8 agreement concerning the telling of the truth. But whether a
9 witness actually tells the truth or not is for you to decide in
10 deciding what credibility to give to the witness.

11 The law allows the use of the testimony of cooperating
12 witnesses. That's an investigative technique. That's a
13 technique that the government uses. You do not judge the
14 government on the investigative techniques that it employs.
15 That's for the government to decide. What you do decide is how
16 to evaluate the evidence. That's your job.

17 Is the evidence sufficient? Has the government proved
18 the case beyond a reasonable doubt? Is the cooperating witness
19 testifying truthfully, as best you can understand it, or
20 shading the truth, the same way that I've instructed you with
21 regard to credibility generally. The law requires that the
22 testimony of cooperating witnesses be scrutinized with care and
23 viewed with caution.

24 A witness who has pleaded guilty and entered into a
25 cooperation agreement may have an interest different from an

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Charge

1 ordinary witness. A witness who hopes that he may achieve a
2 benefit by a possibly lighter sentence from a judge, after the
3 government has written a letter describing what the witness has
4 done in his background and describing the help that the
5 witnesses gave, has a bias.

6 (Continued on next page)

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Charge

1 THE COURT: And that should be taken into account.

2 That makes that witness different from an ordinary witness.

3 But does that mean that the witness is not telling the truth?

4 That's for you to decide, and to what extent, and to what

5 strength you give the cooperating witness' testimony.

6 Witnesses may have motives that shade the truth, and
7 to tell the truth. And each takes an oath to give testimony
8 that is true; nothing but the truth and all together true. The
9 truth, the whole truth, and nothing but the truth. You decide
10 if that witness has satisfied, or not satisfied, his oath, the
11 same way you decide the credibility of all other witnesses.

12 The government has also used confidential informants.
13 And, again, that's a government investigating technique which
14 is no business of yours. And it's not important whether you
15 consider it appropriate or not for the government to use such a
16 technique. The government may do it, and it's your job to
17 decide the credibility of the confidential informant's
18 testimony as it comes before you, and as you judge it according
19 to the rules I give you for judging credibility.

20 You have also heard the testimony of law enforcement
21 agents. The fact that a witness may be employed as a law
22 enforcement agent does not mean that that witness' testimony
23 deserves more or less consideration than any other witness.
24 It's legitimate for defense counsel to impeach the credibility
25 of a law enforcement witness on the ground that testimony may

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Charge

1 be colored by a personal or professional interest in the
2 outcome of the case, just as it's legitimate for defense
3 counsel to impeach the credibility of any other witness,
4 cooperating witness, confidential informant, or just plain
5 witness. That is defense counsel's job. It's your job to
6 evaluate the credibility of the witness.

7 So in general as to all of these things I have talked
8 to you about, these investigative techniques, that's the
9 government's prerogative. Your job is to decide if, upon all
10 of the evidence, or the absence of evidence, on any particular
11 point, the government has or has not proved all of the elements
12 charged beyond a reasonable doubt.

13 Another type of evidence is an expert witness; a
14 witness who is expert on some particular subject that is
15 relevant to a case, and which is probably beyond the
16 circumstances of knowledge of the jury or of the Court or of
17 the lawyers.

18 Expert witnesses are useful because they tell you
19 about things that are relevant that they know about, because
20 they're expert. But you don't drop your job of judging the
21 credibility of those witnesses, either. Because those
22 witnesses can be biased. And their evidence could be
23 misleading. And, again, it's up to you to judge their
24 credibility, as you judge anybody else's credibility.

25 Some of the witnesses who have testified were

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Charge

1 impeached by prior crimes they committed. The law considers
2 that if you have been convicted of a crime, that could be taken
3 into consideration by the jury in deciding if you are telling
4 the truth now. But, again, it's your job to decide the
5 credibility of the witness as the witness testified before you.
6 The fact that there has been a prior conviction of a crime,
7 particularly of a crime that has something to do with truth,
8 may be taken into consideration by you. But it's your decision
9 what consideration to give, how much consideration to give, and
10 how to judge the credibility of the witnesses.

11 Another method of impeachment is to bring out a prior
12 inconsistent statement. At some earlier point, the witness who
13 is describing the same event, described it differently, that's
14 another thing you take into consideration. You judge whether,
15 indeed, there was a prior inconsistency, how important it was,
16 whether it can be explained by the mere passage of time, or of
17 course some other innocent reason as to whether it indicates a
18 lack of credibility, and you judge that as well.

19 And there is another aspect of impeachment, the
20 uncalled witness; the witness who has potentially some useful
21 information to give, but who has not been called. The
22 defendant is not under a burden to call any witnesses. That's
23 part of his presumption of innocence, that is part of the rule
24 that requires the government to bear the sole burden of proving
25 the case beyond a reasonable doubt.

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Charge

1 But if there is a particular witness, and the witness
2 has particular information, either the government or the
3 defendant has the right to subpoena that witness and to bring
4 the witness before you.

5 So if there is a witness who you think might have had
6 useful and relevant information but did not appear in the case,
7 you need to decide: Is that really so? Did the witness really
8 have that information? If the witness came, would it have just
9 been a waste of time? Would the witness have said things that
10 you already knew from other people? And is that an
11 explanation? And there are many other explanations why some
12 people don't appear. What you need to do is to decide, and I
13 repeat this many times because it is key to your function.
14 Look at all of the evidence and look at what is missing and
15 decide: Did the government satisfy its burden to prove the
16 case on each and all of the elements of the crimes charged
17 beyond a reasonable doubt.

18 The defendant did not testify in this case. That's
19 his right. That's his Constitutional right. It is the
20 government's job to prove guilt beyond a reasonable doubt. You
21 may not attach any significance to the fact that the defendant
22 did not testify. No adverse inference may be raised against
23 him, because he did not take the witness stand. That is his
24 Constitutional right. You may not consider his not testifying
25 against him in any way. Put it out of your mind. He is

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Charge

1 exercising a Constitutional right of which each and all of us
2 enjoy.

3 The government claims that certain statements made by
4 the defendant constitute admissions against him. The defendant
5 denies that. It's for you to decide whether what the defendant
6 said or didn't say was an admission or was not an admission.
7 And, again, it's your credibility determinations that count on
8 this, and your evaluation of all of the evidence that counts
9 for this point.

10 The government has argued that defendant ran away,
11 evaded coming after him. The defendant has denied that. You
12 decide if the defendant was attempting to avoid arrest and, if
13 so, whether such evasion was some indication of guilt.

14 Evidence of flight may not be used by you as a
15 substitute for proof of guilt. Flight does not create a
16 presumption of guilt. Whether or not evidence of flight
17 exists, may indeed show some feeling of guilt and may have some
18 significance. If you find it, it's your job to evaluate it.
19 If you find that it didn't exist, you put it out of your mind.

20 And, finally, don't ask why other persons are not on
21 trial. Do not draw any inference, favorable or unfavorable, to
22 the government or the defendant for the fact that other persons
23 whom you think should be on trial are not on trial. Those
24 matters are not your concern and have no bearing upon your
25 verdict as to the defendant's guilt. And that guilt is

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Charge

1 determined by your evaluation of the whether the government, on
2 all of the proof, or the absence of proof on any particular
3 point, proved or didn't prove, beyond a reasonable doubt, each
4 and all of the elements of the crime charged.

5 Your recollection in doing this governs. Only yours.
6 What the government or defense may have said in argument, does
7 not take away your own obligation to search your own minds and
8 make your own recollections. If you are unsure of any
9 particular point, you have a right to ask for testimony to be
10 reread. If you want testimony reread, we'll get the reporter
11 to bring up the particular pages. The defense and government
12 will review those pages. And we can pass to you the transcript
13 of the particular point. But it takes time to respond to that
14 inquiry. Meanwhile, you keep your deliberations going and
15 we'll answer the particular questions you might have.

16 Some of you took notes. Those notes are for your own
17 personal use only. You may not use your notes to refresh
18 someone else's recollection on some particular point. If your
19 memory needs recollection, the way to do that is to ask for the
20 testimony to be reread, as I just mentioned.

21 Sympathy, bias, all of those other extraneous things
22 do not enter the case. Your job, as jurors, is to evaluate the
23 evidence, not exercise sympathy, not exercise bias. There is
24 no room for bias of any ethnic or racial or personal
25 characteristic in this courtroom. We are all equal. We are

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Charge

1 all the same, we are all created in the image of God. We're
2 all citizens of the United States of America. We all have our
3 Constitutional rights. We're all equal. Your job is to look
4 at the facts, evaluate them, and apply them, apply the rules of
5 law to those facts, and come to a decision.

6 I do not have an opinion as to the facts. And I do
7 not have likings or dislikes with respect to counsel. This
8 case is not to be decided whether you like a lawyer or you
9 don't like a lawyer; whether a lawyer has made objections or
10 not made objections; or whether a lawyer has prevailed on
11 objections, or not prevailed on objections.

12 The objections are not your business, they're mine.
13 They're a signal to me that something may have happened that
14 requires a ruling on my part. And I rule. My rulings have
15 nothing to do with the merits. I have no opinions about the
16 merits. I have asked questions of witnesses. My questions are
17 no more or no less important than the questions of the lawyers.
18 The evidence is what is important, no matter who elicited it.
19 And you make those decisions that you have to make on the basis
20 of the evidence.

21 The question of punishment of the defendant is not
22 your concern, either. I have that burden under the law. If a
23 person is found guilty, and at the time of sentence, with
24 various other procedures that are involved. Put those issues
25 out of your mind. Your job is to weigh the evidence relative

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Charge

1 to the crimes charged. And to ask yourselves if the government
2 has or has not satisfied its burden of proof with regard to
3 each and all of the elements.

4 In terms of your deliberations, your first job will be
5 to elect a foreperson. The practice in this court is that in
6 the absence of a vote to the contrary, juror number one who is
7 Lorraine Corchado, is the foreperson. But it's your decision.
8 You elect the foreperson; that's the first thing you do. And
9 the first note that you will send out is that so and so is the
10 foreperson, signed by that foreperson. And that person becomes
11 the foreperson.

12 So what is the job of the foreperson? The foreperson
13 has no more vote than anyone else, no more entitlement than
14 anyone else. The job of the foreperson is to preside over the
15 jury, to make sure that each juror has an equal opportunity to
16 express his or her opinion. Jury deliberations are democratic.
17 There is no entitlement to say something that's worth more than
18 what someone else says. Each person has an obligation to
19 listen. Each person has an obligation to speak his or her
20 mind. Because you have to deliberate together. You act as
21 one. Your consciences are separate, but when you vote, you
22 vote as a jury. And your vote must be unanimous, either to
23 vote guilty or to vote not guilty. And you keep on
24 deliberating until you come to a point where each of your
25 consciences allows you to vote in a certain way. And that's

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Charge

1 your job. And the job of the foreperson is to make sure that
2 no one imposes authority over anyone else. Everyone has an
3 equal chance. If there is a question, to write that question
4 out and to give it to me and I'll then discuss it with the
5 lawyers and we'll respond to you.

6 You commence deliberating, when all of you are
7 together in the jury room. All 12 of you must be deliberating,
8 and cannot have separate deliberations. You cannot have
9 groups. You must deliberate together as a jury.

10 With regard to notes, Ms. Jones will give you -- well,
11 you'll have your notebooks. You write out your note. Your
12 note should not tell me about anybody who is voting or not
13 voting a certain way. I do not want to know how you feel about
14 the merits. But if you have questions to ask, you ask them by
15 way of your note. The Court Security Officer will be
16 appointed, will get your note and give it to me. We'll mark it
17 as an exhibit. I'll read it to the lawyers. We'll decide how
18 best to answer it. But we will answer it. And then we'll
19 assemble you together, I'll read the note again to you, and
20 answer your note, and ask you if you have any further questions
21 with regard to the note, and you can tell me at that time.

22 At the end of the case, with regard to exhibits, the
23 lawyers will collect the exhibits and they will be available to
24 you if you want them. You can ask for a particular exhibit.
25 You can ask for all of the exhibits. I suggest that you start

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Charge

1 your deliberations. And if you need particular things, you can
2 ask for them.

3 When you come to a verdict, you will write me a note
4 which will say -- the foreperson will write me a note. And it
5 will say: The jury has come to a verdict.

6 Do not send out the verdict sheet. Don't tell me what
7 the verdict is. Just tell me that the jury has reached a
8 verdict. When that happens, I'll bring all of the jury in, the
9 note, the verdict sheet, will be opened in Court. And then it
10 will be read. And that will be the delivery of the verdict.
11 So don't tell me about it in advance.

12 That concludes the presentation of the instructions.

13 At this point, I need to consult with the lawyers.
14 We'll go into the robing room and have a short consultation.
15 Stay in your seats, please. This will take just a few minutes
16 and then I'll come back and finish up.

17 (Continued on next page)

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Charge

1 (In the roping room)

2 THE COURT: Does the government have any comment?

3 MR. BLANCHE: No, your Honor.

4 THE COURT: Does defense have any comment?

5 MR. RICHMAN: Respectfully, your Honor, page 42, you
6 made reference to informant. You actually described it as
7 confidential informant. There were no confidential informants
8 in this particular case.

9 THE COURT: Does it make a difference?

10 MR. RICHMAN: I believe it doesn't, I just call it to
11 your attention.

12 THE COURT: Do you want me to --

13 MR. RICHMAN: No, leave it go. I just wanted to call
14 it to your attention.

15 THE COURT: Anything else, Mr. Richman?

16 MR. RICHMAN: No.

17 THE COURT: Okay.

18 So the next step is to excuse juror 14, Patricia
19 Doren. The rule requires, Rule 23 requires a jury of 12. I do
20 not generally keep the person. I excuse -- I excuse a
21 person -- once in a blue moon a jury of 11 comes back because
22 someone is excused. But I think it is artificial to keep that
23 person glued to this case in some fashion. And then the jury
24 has to forget about all deliberations that it has conducted
25 until that person comes in. So I just excuse that person. And

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Charge

1 tell them not to communicate with the jury until it's all
2 finished, or with anyone else? And any objections to that.

3 MR. RICHMAN: No.

4 MR. BLANCHE: Fine with the government, Judge.

5 THE COURT: Anything else I should consider before we
6 go back?

7 MR. BLANCHE: No, your Honor.

8 THE COURT: I would like to compliment both sides on a
9 good job, really well done. There was a lot of detail in this
10 case. I think the government did an excellent job in
11 presenting it, and explaining it. And I think Mr. Richman did
12 an excellent job in doing what a defense counsel has to do.
13 And I personally enjoyed this trial very much.

14 MR. RICHMAN: Thank you. Sir, I believe you requested
15 the list of those exhibits?

16 THE COURT: Yes.

17 MR. BLANCHE: We have our written version, we'll give
18 it to Ms. Jones.

19 MR. RICHMAN: I'll give it to Ms. Jones, too.

20 THE COURT: Thanks.

21 (Continued on next page)

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Charge

1 (In open court)

2 THE COURT: There have been no objections or comments
3 to the charge as I gave it. It is the charge that stands, and
4 it is the charge that you are to apply.

5 Rule 23 provides that a jury is a jury of 12, so now
6 you are 13. And it's my obligation, Ms. Doren, to ask that you
7 be excused. I want to thank you very much for your service.
8 As you have seen, we have lost one juror. And in many trials
9 we have to lose more than one. So the fact that you were here
10 and paying attention is critical to our ability to conduct this
11 trial. And I thank you very much. I want to ask you not to
12 communicate with the other jurors until the case is finished,
13 and not to talk about this case either.

14 Ms. Jones will call you when the verdict is delivered
15 and tell you what it is. And then you are not under any
16 further obligation.

17 As I tell all of the jurors at the end of the case,
18 what you do when you deliberate is, in effect, a set of
19 confidential communications, one with the other. You should be
20 talking candidly and honestly and receiving information
21 candidly and honestly. And it is consistent with the whole
22 concept of jury duty, that what you exchange with each other in
23 the jury room remains in the jury room. And it remains
24 confidential to all of you.

25 And Ms. Doren, you would be included with that, as

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Charge

1 well. So thank you very much, you are excused. Ms. Jones will
2 take your book and tear up your notes and give you
3 instructions.

4 (Alternate juror 13 excused)

5 THE COURT: And now Ms. Jones will swear the Court
6 Security Officer.

7 (Marshal sworn)

8 THE COURT: The jury may now retire. And we are
9 giving juror number one, Ms. Corchado, the verdict sheet and
10 envelopes for notes. If you write a note, put it in the
11 envelope, seal it up, and send it to us.

12 The jury may retire and begin its deliberations. I
13 think lunch is there; right, Brigitte?

14 THE DEPUTY CLERK: Yes.

15 (Jury retires to deliberate upon its verdict)

16 THE COURT: Brigitte, Mr. Richman has his list of
17 pictorial exhibits. And do you have the government's list?

18 MR. BLANCHE: Yes.

19 THE COURT: So both of you will be standing by and
20 Brigitte will have your numbers to reach you.

21 MR. RICHMAN: We're going to have lunch.

22 THE COURT: We'll break for lunch now.

23 Why don't we sit down and let Mr. Fernandez be
24 excused.

25 (Defendant not present)

D350fer5

Deliberations

1 THE COURT: Okay, we're in recess.

2 Mr. Richman, do you renew your motion?

3 MR. RICHMAN: At the end of the entire case, I move
4 for directed verdict of acquittal.

5 THE COURT: Right. For the reasons expressed before.

6 Denied.

7 (Recess)

8 (Continued on next page)

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D35VFER6

Deliberations

1 (At 3:25 p.m., a note was received from the jury)

2 THE COURT: I have a note which was shared with you.

3 I'll read it.

4 First is a question that came out at 3:25, which we
5 marked Court Exhibit 7:

6 "Please supply jury instructions and Counts One and
7 Two."

8 My instructions to Ms. Jones wrote back: "What part
9 of the instructions do you want?"

10 And the answer came back: "Count One and Count Two,
11 elements pertaining to both counts."

12 So I think we need to bring the jury in, and I'll
13 repeat my instructions, or at least those parts of it that the
14 jury seemed to want.

15 Any comments?

16 MR. BLANCHE: No, your Honor. I think that's what
17 they are asking for.

18 THE COURT: Okay. Let me get my notes.

19 All right. Bring in the jury.

20 (Jury present)

21 THE COURT: So the first note by the jury was:
22 "Please supply jury instructions and Counts One and Two."

23 It needs to be signed by the foreperson.

24 Who is the foreperson of the jury?

25 Okay. Ms. Corchado. So you should sign the note as

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Deliberations

1 it comes in, under line "Foreperson," and put the time and the
2 date. You put the time down as 3:25 p.m.

3 We then asked: "What part of the instructions do you
4 want?"

5 And the answer came back: "Count One and Count Two,
6 elements pertaining to both counts."

7 All right. So I can do a number of things, but let me
8 just say this first:

9 It's my practice -- not followed by all the judges --
10 not to give a written charge to the jury. There are several
11 reasons for that. I found through 38 years of practice and 14
12 more as a judge that people listen better than they read. In
13 other words, if I can deliver a charge and watch all of you as
14 I deliver the charge, I find that there's better attention by
15 more people than if I gave the charges to read while I read
16 them. That's my belief. Others disagree. But that's my
17 belief.

18 And I found this out when I was a practicing lawyer,
19 and I had to deal with witnesses, and sometimes gave them
20 things to read. And I never was confident that they would be
21 able to read and retain. And I found that I had a better
22 chance of having that degree of confidence when I told them
23 what it was, and they listened and they could pay attention and
24 answer questions.

25 The second thing is my belief in the democracy of a

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Deliberations

1 jury. There are people who read quicker and more effectively
2 than others. That doesn't make them better jurors or even
3 smarter jurors. And if I were to give out the charges, I would
4 empower some jurors to be the authority with regard to other
5 jurors, or at least so I feel. And so since I believe very
6 much in the democracy of each juror, and, indeed, through my
7 experience as a trial lawyer and as a judge, I have found that
8 wisdom comes from unexpected places having nothing to do with
9 how much education you have, but more with the character and
10 attentiveness and interest of a particular juror.

11 So those are the two main reasons -- there are
12 others -- why I don't give out my charge.

13 Now, I could read everything back to you. But I think
14 what I'd like to do is to give you the highlights of the
15 charge. And then I'll look at you, you'll tell me, Yeah, I
16 want more, this and that.

17 So the first charge was a conspiracy, and there are
18 two elements to a conspiracy:

19 One, the conspiracy exists; and, second, did the
20 defendant become a member. You need that.

21 Do you want me to read those?

22 Ms. Corchado, look around and tell me.

23 THE FOREPERSON: No.

24 THE COURT: No. Okay.

25 If anybody wants me to, I'll do it.

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1 THE COURT: Second. There was discussion of the
2 definition of a conspiracy. This elaborates more on what I
3 just asked you a moment ago of an agreement of two or more
4 persons that has to have a criminal object or unlawful object
5 that this particular conspiracy needed a certain number, other
6 details. So let me do that now.

7 There had to be three details. First, what was the
8 object of the conspiracy; and, second, definitions about
9 interstate facilities and going across interstate facilities
10 and the like.

11 That got a little complicated. Do you want me to read
12 that? No.

13 JUROR: Elaborate on it briefly?

14 THE COURT: Okay. Sure.

15 The first point the government must prove about the
16 object of the conspiracy is that one of the conspirators
17 traveled in interstate or foreign commerce or used a facility
18 of interstate or foreign commerce with the intent that a murder
19 for hire take place.

20 So then I discussed what an interstate facility was;
21 that you had to use an interstate highway, but you didn't
22 necessarily have to travel from one state to another, or you
23 used a phone. And as long as the phone had the capacity to
24 call across state lines, you didn't have to prove that the
25 actual calls that were made crossed state lines, as long as you

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1 use a facility that would be used in interstate phone
2 conversations. And we know cell phones, very few of them,
3 anyhow, at least all of those that I know, and many of them,
4 all of those that I know, have capacity to call New Jersey and
5 California as easily as New York State. So you have the
6 highway and you have the phone.

7 And then you have to have the object, was the object
8 of using the interstate highway or the interstate phone to
9 engage in a murder for hire. And then there were those
10 definitions.

11 The travel across interstate or foreign lines or the
12 use of the interstate or foreign facility must have been
13 undertaken with intent that a murder be committed, in violation
14 of the laws of any state, here, in New York State. And I
15 define "murder" under New York State law as an unlawful killing
16 of another person purposely or knowingly. And we went into the
17 murder, and it had to be in consideration for the receipt of
18 something of value, pecuniary value.

19 So the government had to prove beyond a reasonable
20 doubt there was an agreement by two or more people that
21 defendant joined that agreement. That was a conspiracy. That
22 the purpose of the conspiracy was to commit a murder and use an
23 interstate facility to commit the murder; and that the murder
24 was in exchange for something of value.

25 Then there was the quality of the defendant's

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1 participation in the conspiracy; that he knew about it, it
2 wasn't just an accident; that he wanted to join it; that he
3 adopted its purpose, mere association wasn't enough; that he
4 had to have conscious intent, knowingly, willfully, unlawfully,
5 to join a conspiracy that was to use interstate facilities to
6 commit a murder for hire. And I defined all those terms.

7 Anybody want more elaboration than that? Okay with
8 that?

9 I told you that the date was February 22, 2000. But
10 if the proof was around that date, it was okay.

11 And then if you found a conspiracy, you found the
12 defendant joined the conspiracy.

13 There was a second question on the verdict sheet: Did
14 death result from the actions of the conspirators? And that
15 was it for Count One.

16 Okay with Count One?

17 Then we go to Count Two. And that got more
18 complicated, because there was a double statute that was
19 involved. So I need to go over that with you.

20 There are two subsections of Section 924: (c) and
21 (j).

22 924(c) makes it a crime for any person during and in
23 relation to any crime of violence -- so a crime of violence is
24 the crime to commit a murder, that's a crime of violence. Then
25 it goes on to say, to use or carry a firearm. A gun is a

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1 firearm. To use or carry. I defined possession of a gun and
2 the carrying of a gun, the availability of a gun to the person
3 committing the crime as he moves, or in furtherance of any such
4 crime, to possess a firearm. So if you possess the crime -- if
5 you possess the weapon in order to help you commit the crime of
6 violence, which is the commission of a murder, that spells out
7 the crime. And then it also makes it a crime for any person in
8 the course of a violation of what I've just read out to cause
9 the death of a person through the use of a firearm.

10 So first to find out was a gun used in relationship to
11 a crime of violence. What is the crime of violence? Was a gun
12 used or carried or possessed in furtherance of the crime; and,
13 if so, in the course of that crime, did death result through
14 the use of the firearm. That's the basic definition, and
15 there's more details.

16 Are you okay with this?

17 And then I define the crime had to take place on or
18 about February 22, 2000.

19 Second. That the proof showed beyond a reasonable
20 doubt, and every element the government must prove beyond a
21 reasonable doubt.

22 Second. That the defendant used or carried the
23 firearm during and in relation to a crime of violence or
24 possessed a firearm in furtherance of a crime of violence. So
25 did defendant use or carry a gun in relationship to a crime of

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1 violence or possess it to further the crime.

2 Third. That defendant caused the death of a person
3 through the use of a firearm, either himself or by aiding and
4 abetting another.

5 And fourth. That the death of the person satisfied
6 the definition of murder in federal law. And I'll read that to
7 you again in a moment.

8 So then I defined a firearm, what's meant by use,
9 what's meant by carry, what's meant by possess; that a
10 murder-for-hire conspiracy, you have to decide is that a crime
11 of violence.

12 And the definition of the federal crime of murder is
13 the unlawful killing of a human being with malice of
14 forethought. Unlawful killing -- no justifiable reason -- of a
15 human being, with malice of forethought; meaning that you
16 thought about it before the crime, and you have the intention
17 to kill. Those are the definitions.

18 Are you all right with this? Do you need more?

19 JUROR: I'm good.

20 THE COURT: Okay. Can I see counsel at sidebar?

21 (At the side bar)

22 THE COURT: Comments from the government.

23 MR. BLANCHE: Your Honor, would your Honor clarify
24 with respect to Count One, when you were talking about the
25 highway or the phone, a couple times your Honor, I believe,

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1 said highway and the phone, just to be clear.

2 THE COURT: No, it was or.

3 MR. BLANCHE: Correct.

4 THE COURT: But I'll clarify.

5 MR. BLANCHE: Thank you.

6 And then the other part that I thought was a little
7 unclear about Count One is that the defendant didn't have to be
8 the person who used the phone, which is in your instructions,
9 but I don't think it was said.

10 THE COURT: I'll clarify both of those.

11 MR. BLANCHE: And then just one more little thing,
12 Judge.

13 When your Honor talked about the object of the
14 conspiracy, if you could just use -- I think, your Honor, just
15 to clarify what the object of the conspiracy was, which is to
16 commit a murder for hire, which I don't think was actually
17 said.

18 THE COURT: I think it was.

19 MR. BLANCHE: Okay.

20 MR. RICHMAN: It was said.

21 MR. BLANCHE: I might have missed it.

22 MR. RICHMAN: I think you said it, but clarify the
23 issue that the defendant --

24 MR. BLANCHE: I may have missed it, Judge. Sorry.

25 THE COURT: Three points is?

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1 MR. BLANCHE: The first is that either highway or cell
2 phone. It doesn't have to be "and."

3 THE COURT: Yes.

4 MR. BLANCHE: The second is that the defendant didn't
5 have to be the person to use the interstate facility, highway
6 or phone.

7 THE COURT: Okay.

8 MR. BLANCHE: And then the third one was just the
9 object of the conspiracy, which if you said it, no need to
10 re-say it.

11 The defendant's mind, the object has to be to commit a
12 murder for hire, not to use a phone obviously to commit a
13 murder for hire.

14 THE COURT: I'm not sure about that, because I think
15 the way the instructions run is that the facilities of
16 interstate commerce have to be used for the commission of a
17 murder-for-hire, and that's the way I charged it.

18 MR. BLANCHE: True. To give us jurisdiction, but
19 obviously in the defendant's mind he has to think a murder for
20 hire is being committed, not that phones are going to be used.

21 THE COURT: That gets into another issue, which we did
22 not spot, and I did not charge that way.

23 MR. BLANCHE: Okay.

24 THE COURT: Mr. Richman?

25 MR. RICHMAN: Nothing.

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1 THE COURT: All right. Stay here.

2 (In open court)

3 THE COURT: All right.

4 So the lawyers think that I could just spell out one
5 or two more clarifications. So I'll do that now.

6 I said that there had to be an intention to use an
7 interstate facility, either highway or cell phone or any kind
8 of phone. He didn't have to use it himself, as long as someone
9 in the conspiracy was using it. And the object had to be to
10 use it to commit a murder for hire for pecuniary value.

11 Okay guys? Okay.

12 So you can retire again.

13 Before you go, can I ask you how long do you want to
14 work?

15 JUROR: Another half an hour?

16 JUROR: Can we discuss that inside? We are making
17 progress.

18 THE COURT: Certainly can.

19 Look, you take the time you need, when you need it.
20 We're all at your service.

21 All right.

22 So you do what you think is right. And if you feel --
23 one thing you don't want, you don't want to just do it to
24 finish it. Both sides need to have the confidence that you are
25 doing what you need to do. And if you have to come in

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1 tomorrow, you come in tomorrow. The government has a problem
2 with money, but it's not that good.

3 JUROR: Understood.

4 THE COURT: All right.

5 So you tell us.

6 You can tell the court security -- just give him a
7 note.

8 JUROR: Okay.

9 (Jury deliberations resumed; time noted: 4:15 p.m.)

10 THE COURT: Let the record be clear that I'm giving
11 back the government pen to my law clerk.

12 All right. Thank you.

13 MR. RICHMAN: Your Honor, most respectfully, while
14 we're here, I have a 9 o'clock.

15 THE COURT: Don't worry about it. Nothing happens
16 till you get here.

17 (Recess pending verdict)

18 (At 4:40 p.m. a note was received from the jury)

19 THE COURT: The jury's note: "Hi. We would like to
20 continue deliberating tomorrow. With your permission, we would
21 like to be dismissed today by 5 p.m."

22 We'll do that. I'll let you know at the end.

23 Let them stay another ten minutes.

24 THE MARSHAL: Okay.

25 THE COURT: For tomorrow, we would like, one, Patrick

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1 Darge's testimony. And then, colon, and four sub points.

2 Conversations with Joe about the murder plot; conversation with
3 Joe in prison; Patrick's letter to his grandmother. Those are
4 three. Okay. So we can get them.

5 Second. Jeffrey Minaya's testimony: His
6 understanding as to who the second shooter was.

7 Three: Alain Darge's testimony when he met with Joe
8 at Christian Guzman's apartment and Joe confessed to him.

9 Thanks so much.

10 Loreinnie Corchado, March 5, 2013, 4:40 p.m.

11 All right.

12 So I think those are limited points in the transcript.
13 I would ask the government and defense to collaborate and to
14 gather the materials, and then supply them to the jury. And I
15 think four copies would be enough.

16 MR. RICHMAN: Your Honor, do you intend to supply them
17 to the jury or have them read back to the jury?

18 THE COURT: Supply them to the jury.

19 MR. BLANCHE: So your Honor, assuming --

20 THE COURT: Any problem with that, Mr. Richman?

21 MR. RICHMAN: Your Honor, does that not create the
22 same problem that we were concerned with by supplying them the
23 interpretation of the --

24 THE COURT: No, there's no interpretation. It's going
25 to be just the testimony. They'll deliberate on what it is.

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1 You know what? Why don't you gather -- the two of you
2 gather what the jury wants, and then we'll have a discussion
3 whether I should read it to them or Martha or Denise should
4 read it to them, or just hand it to them. You'll look at it
5 and you'll see.

6 MR. RICHMAN: Shall I cancel my appointment for
7 tomorrow morning?

8 THE COURT: No, you should not. Your health is more
9 important. You'll take that time anyhow to gather all that
10 stuff.

11 MR. RICHMAN: Brian will be in.

12 THE COURT: And the jury will wait a bit, that's all.

13 All right. So I'll leave you the note. And you work
14 on it. And you can tell the jury that. It's okay to tell the
15 jury.

16 MR. RICHMAN: Yes, your Honor.

17 THE COURT: You can tell the jury we're working on
18 their items; they should come back tomorrow at 10 o'clock and
19 deliberate. And when we're ready, we'll call them in.

20 MR. RICHMAN: Thank you.

21 THE COURT: All right.

22 So Brigitte will go back with you.

23 THE MARSHAL: Yes, sir.

24 THE COURT: Good night, everybody.

25 MR. BLANCHE: Good night, Judge.

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1 MR. RICHMAN: Good night, your Honor.

2 THE DEPUTY CLERK: Good night, Judge.

3 (Adjourned to March 6, 2013 at 10 o'clock a.m.)

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